SEPTEMBER 1985

ommission Decisions

dministrative Law Judge Decisions

COMMISSION DECISIONS

iew was granted in the following case during the month of September:

retary of Labor, MSHA v. Youghiogheny & Ohio Coal Company, Docket
LAKE 84-98. (Judge Kennedy, August 8, 1985)

iew was denied in the following cases during the month of September:

edict Straka v. Consolidation Coal Company, Docket No. PENN 85-231-D.
dge Fauver, July 30, 1985)

liano Rosa Cruz v. Puerto Rican Cement Company, Docket No. SE 83-62-DM.
dge Broderick, August 5, 1985)

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 16, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 82-155-M
v.	:	WEST 83-60-M
KENNECOTT MINERALS COMPANY, UTAH COPPER DIVISION	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

These civil penalty cases, arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 801 et seq. (1982), require us to interpret 30 C.F.R. § 55.9-22, the berm standard applicable to metal and nonmetal open pit mines from 1970 through 1984. 1/ A Commission administrative law judge held that the standard was merely advisory and dismissed the Secretary of Labor's proposal for penalty. 6 FMSHRC 2023 (1982)(ALJ). We disagree. For the reasons that follow, we reverse the judge's decision and remand for assessment of appropriate civil penalties.

These cases arose out of two citations issued to the Kennecott Minerals Company, Utah Copper Division, ("Kennecott") in 1982 and 1983 by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"). The citations alleged that Kennecott had violated 30 C.F.R. § 55.9-22 by failing to maintain adequate berms or guardrails along an access road to the tailings pond associated with its Magna and Arthur concentrators. Kennecott did not deny that the road lacked berms or guardrails; however, it contested the citations on a

1/ In the 1984 edition of 30 C.F.R., the standard stated, "Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways." In this edition, 30 C.F.R. Parts 56 and 57 contained identical standards applicable to sand, gravel, and crushed stone operations, and metal and nonmetal underground mines. On January 25, 1985, the Secretary of Labor promulgated a recodification combining Parts 55, 56, and 57 into a single new Part 56. New section 56.9022 also states, "Berms or guards shall be provided on the outer bank of elevated roadways."

on mine operators and that the Secretary's civil penalty proposal therefore could not be sustained.

The judge based his decision on the fact that when the standard was originally promulgated in 1970, it read "Mandatory. Berms or guards should be provided on the outer bank of elevated roadways." 34 Fed. Reg. 3660, 3663 (emphasis added). He pointed out that this language represented a change from the standard as proposed in 1969, which had included the word "shall" instead of "should," and noted that the preamble to the final rule stated, "In a few instances in which the language of a proposed mandatory standard appeared to impose a requirement not within the intendment of the standard, the standard has been rephrased." The judge also stated that Jim Walter Resources, Inc., 3 FMSHRC 2488, 2490 (1981), in which the Commission held that a standard requiring that an ANSI standard "be used as a guide" was merely advisory, was "much akin" to this case. He pointed out that the word "shall" "has almost universally been ... used in regulations to express what is mandatory," and concluded that "the Secretary proposed the standard in mandatory form and promulgated it in advisory form." Therefore, he held that the citations must be vacated.

On review, the Secretary argues that the promulgation history of the standard establishes its mandatory nature. He points out that although the word "shall" in the proposed standard was changed to "should" in the final rule, the designation of the standard as "Mandatory" was never changed, and that the preamble to the proposed rule clearly states that "where the word 'Mandatory' appears in a standard, the standard is a mandatory one." The Secretary argues that the preamble language that the judge relied upon does not support his holding that the use of the word "should" was intended to make compliance with the berm standard less than mandatory. He notes that the quoted sentence was followed by examples of instances in which a proposed mandatory standard appeared to impose an unintended requirement, and asserts that the changes in those examples, unlike the change in the berm standard, merely "correct obvious mistakes."

In this case, the Secretary claims, it was the use of the word "should" in the promulgated standard that was a clerical error. That error was corrected in the 1974, and subsequent editions of the Code of Federal Regulations, as well as the "Yellow Book", have all included the word "shall" in the standard. 3/ The Secretary also argues that in 1979 all advisory standards for metal and nonmetal mines were either revoked or made mandatory (44 Fed. Reg. 48,490) and that the judge's

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2/ Most of Kennecott's arguments represented an attempt to establish that the standard was not applicable to the cited location. The administrative law judge rejected Kennecott's position and Kennecott has not renewed it in this appeal.

3/ The "Yellow Book" was a compilation of all metal and nonmetal mine safety and health standards. It was published by the Secretary of the Interior in 1972, and widely disseminated through the mining community.

tary of Labor v. Cleveland Cliffs Iron Co., 3 FMSHRC 291 (1981) and Secretary of Labor v. El Paso Rock Quarries, 3 FMSHRC 35 (1981), the Commission upheld citations issued under the berm standard. He argues that by imposing civil penalties in those cases, the Commission found the berm standard to be mandatory.

In support of the judge's decision, Kennecott argues that when the standard was promulgated originally the change in wording from "shall" to "should" "was intended to be significant." It cites the preamble language quoted by the judge, supra, and also claims that the decision in Jim Walter Resources, supra, is applicable to this case. Based on dictionary definitions of "should," and "shall," it argues that, under the standard as promulgated, berms might be "proper" or "expedient," but nevertheless not required. Kennecott also attacks the Secretary's position that the use of the word "should" in the original Federal Register promulgation of the standard was a clerical error which could be informally corrected in the Code of Federal Regulations. It argues that there is no authority for such "informal" corrections by the Federal Register staff and that there is no way of knowing whether the change from "should" to "shall" accurately reflected the intent of the Secretary. It points out that since the combination of the words "Mandatory" and "should" in the berm standard was unique in the Part 55 regulations, "[i]t is just as reasonable to conclude that ... inclusion of the term 'mandatory' was erroneous."

Our own examination of the standard's language and history convinces us that it is now and always has been a mandatory standard. As the parties point out, the standard was first proposed by the Secretary of the Interior in 1969. 34 Fed. Reg. 639. It was part of a major package of standards applicable to metal and nonmetal mines proposed pursuant to the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 et seq. (1976), a predecesser statute to the Mine Act. As proposed, the standard read:

> 55.9-22. Mandatory - OPAC - Berms or guardrails shall be provided on the outer bank of elevated roadways.

The standards included in the 1969 proposal were later promulgated in several stages. The first stage, on July 31, 1969, included standards on which no comments had been received and which were promulgated without change from the proposal. 34 Fed. Reg. 12503 (1969). Included in this group was the "Purpose and Scope" section of Part 55:

> Each standard which is preceded by the word "Mandatory" is a mandatory standard. The violation of a mandatory standard will subject an operator to an order or notice under section 8 of the Act (30 U.S.C. § 727).

30 C.F.R. § 55.1.

ond stage promulgation, on February 25, 1970, included the
issue. This promulgation was comprised of standards on
ts had been received but which (with one exception noted
promulgated without substantive change. All standards that
posed as mandatory were promulgated with the designation
35 Fed. Reg. 3660 (1970). As the parties have noted, the
this promulgation stated:

the purpose of clarification, revisions have been
e in some of the standards which the advisory
mittee recommended be mandatory, but no substantive
nges have been made except in Standard 55.6-1, which
ates to explosives and which is discussed below.
a few instances in which the language of a proposed
datory standard appeared to impose a requirement
within the intendment of the standard, the standard
been rephrased. For example, proposed Standard
4-1 appeared literally to prohibit smoking wherever
or grease is used; the revised standard relates
prohibition to the hazard involved. Similarly, pro-
ed Standards 55.6-59 and 55.6-60, when read separately,
eared to require that all persons be removed from
as endangered by flyrock from blasting and that
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Part 55 combines the alternatives clearly contem-
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is fact, we hold that the standard always imposed a manda-
nt on mine operators.

›iguity we have examined the context and history of the berm standard determine its nature. Our determination that the standard imposed a ıdatory duty is based in part on the language of 30 C.F.R. § 55.1, the :pose and Scope section of Part 55. As noted above, that section ıtes, "Each standard which is preceded by the word 'Mandatory' is a ıdatory standard." It goes on to state that violation of those standards ›ignated mandatory will subject a mine operator to enforcement action the Secretary. The essential defining characteristic of a mandatory le is that "failure to comply with [its] requirements ... subjects the ıcomplier to affirmative legal liabilities." 1A Sutherland, Statutory ıstruction § 2503 (3d ed. 1972). In this case the regulatory scheme ›arly provides that failure to comply with a provision labelled ındatory" will subject an operator to the Act's enforcement mechanisms ı penalties.

Further, in light of the arguments made by Kennecott, it is notably :onsistent to argue (1) that the 1970 "should" must prevail over hall" even though the former word was changed to "shall" in 1974 and appeared in the standard when these violations occurred, and (2) to gue at the same time that the consistent appearance in the standard of e prefatory word "Mandatory," (which has appeared in the standard from ception), must be charged to mistake.

As set forth above, the regulatory history of the standard supports r conclusion that it imposes a mandatory duty on mine operators. Also, find it significant that the standard was proposed as mandatory and at no standards proposed as mandatory were promulgated as merely visory in the relevant rulemaking. On other occasions, the Secretary s amended advisory standards and made them mandatory, but this has en done through full rulemaking procedures. See 35 Fed. Reg. 10299 970)(proposal), 35 Fed. Reg. 18587 (promulgation) and 43 Fed. Reg. 766 (1978)(proposal), 44 Fed. Reg. 48490 (1979)(promulgation). We ve not been cited to any instance in which the Secretary proposed a andard as mandatory and promulgated it as advisory.

In reaching this conclusion, we emphasize that we are not approving e "informal correction" process through which the language of the :andard apparently was changed in the Code of Federal Regulations. The .lemaking process, as established by the Federal Register Act, 44 U.S.C. 1501 et seq., and the Administrative Procedure Act, 5 U.S.C. § 500 : seq., as well as by the Mine Act and its predecessor statutes, contem-.ates that notice be given in the Federal Register of all changes in ;ency rules. Neither the Secretary nor the Office of the Federal Register :self is free to disregard this requirement. Indeed, the Secretary on :her occasions has corrected clerical errors in standards by publishing ›tice of the corrections in the Federal Register. See e.g., 34 Fed. :g. 6737 (1969), 34 Fed. Reg. 3947 (1969), and 35 Fed. Reg. 4315 (1970). ıther, our holding in this case is based on the fact that we find that ıe language of the originally promulgated standard imposed a mandatory :equirement consistent with the later-published "corrected" version.

below) were promulgated without substantive change. All standards that had been proposed as mandatory were promulgated with the designation "Mandatory." 35 Fed. Reg. 3660 (1970). As the parties have noted, the preamble to this promulgation stated:

> For the purpose of clarification, revisions have been made in some of the standards which the advisory committee recommended be mandatory, but no substantive changes have been made except in Standard 55.6-1, which relates to explosives and which is discussed below. In a few instances in which the language of a proposed mandatory standard appeared to impose a requirement not within the intendment of the standard, the standard has been rephrased. For example, proposed Standard 55.4-1 appeared literally to prohibit smoking wherever oil or grease is used; the revised standard relates the prohibition to the hazard involved. Similarly, proposed Standards 55.6-59 and 55.6-60, when read separately, appeared to require that all persons be removed from areas endangered by flyrock from blasting and that shelters be provided; Standard 55.6-160 hereby added to Part 55 combines the alternatives clearly contemplated by the two proposed standards. Changes, some substantive, also have been made in a number of the advisory standards.

As promulgated, section 55.9-22 read:

> Mandatory. Berms or guards should be provided on the outer bank of elevated roadways.

35 Fed. Reg. 3660, 3663.

The standard appeared in this form in the 1970-1973 editions of the Code of Federal Regulations. In the 1974 edition, however, without explanation, and apparently without notice in the Federal Register, the standard appeared with the word "should" changed to "shall." Subsequent editions of the Federal Register have continued to publish the standard containing the word "shall."

The parties have argued extensively over which version of the standard is "correct." We do not find it necessary to resolve this question, however, because we believe that the two versions of the standard impose identical requirements on mine operators. We consider the most important factor in determining the nature of the standard to be the fact that it has consistently contained the designation "Mandatory." In light of this fact, we hold that the standard always imposed a mandatory requirement on mine operators.

ambiguity we have examined the context and history of the berm standard to determine its nature. Our determination that the standard imposed a mandatory duty is based in part on the language of 30 C.F.R. § 55.1, the Purpose and Scope section of Part 55. As noted above, that section states, "Each standard which is preceded by the word 'Mandatory' is a mandatory standard." It goes on to state that violation of those standard designated mandatory will subject a mine operator to enforcement action by the Secretary. The essential defining characteristic of a mandatory rule is that "failure to comply with [its] requirements ... subjects the noncomplier to affirmative legal liabilities." 1A Sutherland, Statutory Construction § 2503 (3d ed. 1972). In this case the regulatory scheme clearly provides that failure to comply with a provision labelled "Mandatory" will subject an operator to the Act's enforcement mechanisms and penalties.

Further, in light of the arguments made by Kennecott, it is notably inconsistent to argue (1) that the 1970 "should" must prevail over "shall" even though the former word was changed to "shall" in 1974 and so appeared in the standard when these violations occurred, and (2) to argue at the same time that the consistent appearance in the standard of the prefatory word "Mandatory," (which has appeared in the standard from inception), must be charged to mistake.

As set forth above, the regulatory history of the standard supports our conclusion that it imposes a mandatory duty on mine operators. Also, we find it significant that the standard was proposed as mandatory and that no standards proposed as mandatory were promulgated as merely advisory in the relevant rulemaking. On other occasions, the Secretary has amended advisory standards and made them mandatory, but this has been done through full rulemaking procedures. See 35 Fed. Reg. 10299 (1970)(proposal), 35 Fed. Reg. 18587 (promulgation) and 43 Fed. Reg. 40766 (1978)(proposal), 44 Fed. Reg. 48490 (1979)(promulgation). We have not been cited to any instance in which the Secretary proposed a standard as mandatory and promulgated it as advisory.

In reaching this conclusion, we emphasize that we are not approving the "informal correction" process through which the language of the standard apparently was changed in the Code of Federal Regulations. The rulemaking process, as established by the Federal Register Act, 44 U.S.C. § 1501 et seq., and the Administrative Procedure Act, 5 U.S.C. § 500 et seq., as well as by the Mine Act and its predecessor statutes, contemplates that notice be given in the Federal Register of all changes in agency rules. Neither the Secretary nor the Office of the Federal Registe itself is free to disregard this requirement. Indeed, the Secretary on other occasions has corrected clerical errors in standards by publishing notice of the corrections in the Federal Register. See e.g., 34 Fed. Reg. 6737 (1969), 34 Fed. Reg. 3947 (1969), and 35 Fed. Reg. 4315 (1970). Rather, our holding in this case is based on the fact that we find that the language of the originally promulgated standard imposed a mandatory requirement consistent with the later-published "corrected" version.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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September 17, 1985

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 84-98
YOUGHIOGHENY & OHIO COAL CO.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This case is before the Commission on a petition for discretionary review filed by the Youghiogheny & Ohio Coal Company from a decision issued by the Commission administrative law judge on August 8, 1985. 7 FMSHRC __ (August 1985)(ALJ). Youghiogheny & Ohio's petition for revi raises issues concerning (1) the appropriateness of the civil penalties assessed by the judge and (2) the legal sufficiency of the judge's final decision, i.e., the lack of findings of fact, conclusions of law, and the bases for those findings and conclusions. The text of the judge's final decision is as follows:

> This matter came on for an evidentiary hearing in Wheeling, West Virginia on May 30 and 31, 1985. At the conclusion of the evidence the trial judge entered a tentative bench decision (Tr. 408-409) finding the two violations charged did, in fact, occur and that the penalties warranted were $1,000 for Citation 2203748 and its companion closure order and $950 for Citation 2327363.
>
> Upon receipt of the transcript, the trial judge issued an order to show cause why the tentative decision should not be confirmed as the final disposition of this matter. The operator having failed to show cause, it is ORDERED that the tentative decision of May 31, 1985 be, and hereby is, ADOPTED and CONFIRMED as the final disposition of this case. It is FURTHER ORDERED that the operator pay the amount of the penalty found warranted, $1,950, on or before Monday, August 26, 1985.

We conclude that the judge's decision of August 8, 1985 violates Commission Procedural Rule 65(a). 29 C.F.R. §2700.65(a). Rule 65(a), titled "Decision of the Judge", provides that the judge's decision "shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record ...." In addition, Rule 65(a) also provides,"If a decision is announced orally from the bench, it shall be reduced to writing after the filing of the transcript." The judge's decisio in this case fails to meet the clear and important mandate of Rule 65(a). S Kerr-McGee Nuclear Corporation, 1 FMSHRC 1783 (November 1979).

Accordingly, the judge's decision is vacated and the case is remanded to the judge for entry of a decision in accordance with the Commission's Rules of Procedure. In view of our holding concerning Rule 65(a), we do not address at this time the penalty-related arguments that the operator raises in its petition for review. Following the issuance of the judge's decision on remand, any party adversely affected may seek Commission review. 30. U.S.C. §§ 823(d)(2)(A)(i) & (ii).

Richard V. Backley, Acting Chairman

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September 30, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 82-152-R WEVA 82-369
v.	:	
WESTMORELAND COAL COMPANY	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated civil penalty and contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). At issue is Westmoreland Coal Company's ("Westmoreland") alleged "unwarrantable failure" to comply with 30 C.F.R. § 75.202, a mandatory roof control standard. 1/ The administrative law judge found that the violation occurred, that it was "unwarrantable," and that an $8,000 penalty was appropriate. 5 FMSHRC 132 (January 1983)(ALJ).

1/ 30 C.F.R. § 75.202, which is identical to section 302(c) of the Mine Act, 30 U.S.C. § 862(c), provides:

> The operator, in accordance with the approved roof control plan, shall provide at or near each working face and at such other locations in the coal mines as the Secretary may prescribe an ample supply of suitable materials of proper size with which to secure the roof of all working places in a safe manner. Safety posts, jacks, or other approved devices shall be used to protect the workmen when roof material is being taken down, crossbars are being installed, roof bolt holes are being drilled, roof bolts are being installed, and in such other circumstances as may be appropriate. Loose roof and overhanging or loose faces and ribs shall be taken down or supported. Except in the case of recovery work, supports knocked out shall be replaced promptly.

(Emphasis added).

Westmoreland seeks review of these conclusions. For the reasons that follow, we affirm in part, reverse in part, and remand for reconsideration of the appropriate penalty.

On January 11, 1982, a rib fall at Westmoreland's Eccles No. 6 mine resulted in the death of scoop operator John Clay. The following day the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an investigation and, pursuant to section 104(d)(1) of the Mine Act, issued an order of withdrawal citing a violation of 30 C.F.R. § 75.202. The order stated:

> During a fatal accident investigation it was revealed that the known overhanging rib in the old 2 north entry on 2 south west section (027-0), 55 feet inby survey station No. 9363, was not supported or taken down which resulted in a fatal accident. The section was supervised by Robert Hairston, who was aware of the condition.

The order also alleged that the violation was caused by Westmoreland's unwarrantable failure to comply with 30 C.F.R. § 75.202. 2/

The rib fall occurred in an area of the mine known as the "old works." This area had been last mined in the 1930's and from then until January 1982, no employees of Westmoreland had either worked or traveled in that area. However, on Monday, January 11, 1982, a work crew was sent into the area to build a stopping needed to maintain required ventilation. On

2/ Section 104(d)(1) in relevant part provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

January 11, after the crew arrived in the area, the section foreman, Robert Hairston, performed an examination of all of the work places, including where the accident would later occur, and then assigned duties to the crew members. Under the sequence of operations which Hairston assigned, the first person to work in the area was Albert Honaker, a continuous mining machine operator. Honaker cleaned rock and coal from the mine floor with the continuous miner in order to enable the roof bolti crew to come in and install roof bolts where the stopping was to be built. From a distance of 20 feet, Honaker observed a coal formation, which he termed a "brow," protruding from the left rib and forming an arch where the roof and rib met. Honaker did not attempt to cut the brow with the continuous miner because, at that time, to do so would have required working beneath unsupported roof. Honaker alerted the incoming bolting crew about the brow and moved the continuous miner into another work area.

Arthur Burdiss, the bolter helper, bolted the entry and set four bolts within four or five inches of the brow. He attempted to bolt through the brow in order to support it, but the canopy height of the bolting machine restricted access and he was unable to bolt in the brow. Burdiss also tried unsuccessfully to dislodge the brow by exerting pressure on it with the bolter's hydraulic canopy. He and George Ayers, the roof bolter, then unsuccessfully attempted to pry down the brow with a slate bar.

Meanwhile, Honaker informed section foreman Hairston of the presence of the brow. Honaker and Hairston returned to the entry and both tried unsuccessfully to pry down the brow. Subsequently, John Clay and Jim Milam, the miners assigned by Hairston to build the stopping, entered the area. After examining the brow these two miners also attempted, unsuccessfully, to bar it down. Clay and Milam then began the assigned work of constructing the stopping. Shortly thereafter Milam saw a small flake fall. Before he could shout a warning, the brow fell, killing Clay.

Upon notification to MSHA, an investigation was made and the issuance of the contested unwarrantable failure withdrawal order followed. Westmore land contested the order arguing that the cited standard was not applicable or was unenforceably vague. Alternatively, Westmoreland argued that it had affirmatively defended against the Secretary's allegation by establishing that compliance was more dangerous than abatement--the so-called "greater hazard" or "diminution of safety" defense. Westmoreland further argued tha if a violation occurred it was not caused by Westmoreland's unwarrantable failure to comply with the standard. The administrative law judge rejected each of these arguments.

On review, Westmoreland asserts that the judge erred. With respect to its applicability/vagueness challenge, Westmoreland contends that in upholding the standard's application to the facts at issue the judge erroneously equated the term "brow" with the term "overhanging rib" used in the standard, and that he erred in requiring that every "brow" must be taken down or supported. We disagree. We find that the judge correctly concluded that the standard's language informs, with sufficient certainty,

5 FMSHRC 3 (January 1983). Moreover, we read the judge's decision as simply holding that under the particular facts of this case the coal formation that was present in the entry was an "overhanging rib" within the meaning of the standard. The judge did not purport to offer an all inclusive interpretation of the standard, nor was he called upon to do so. We further find that the judge's conclusion that the coal formation at issue was an "overhanging rib" is supported by substantial evidence of record and must therefore be sustained. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Regardless of the discrepancies in the witnesses' estimates of the precise dimensions of the coal formation prior to its fall, it is clear from the record that each of the experienced miners here had determined that the formation required their attention and appeared to necessitate being barred down. Although after repeated unsuccessful attempts to remove it they determined to their satisfaction that it was not hazardous (which determination, tragically, turned out to be erroneous), on the facts of this case we find that their first determination, rather than their second, is demonstrative as to the standard's applicability, and viewed in conjunction with the Secretary's evidence as to the nature of the coal formation, constitutes substantial evidence.

Westmoreland also contends that the judge erred in concluding that Westmoreland failed to establish a diminution of safety defense to the violation. Westmoreland argues that the compliance with the standard would have posed safety risks to miners equal to or greater than those posed by the condition itself. The judge applied the three-prong test that the operator must meet to establish the defense: (1) the hazards of compliance are greater than non-compliance; (2) alternative means of protecting miners are unavailable; and (3) a modification proceeding under section 101(c) of the Mine Act would not have been appropriate. Penn Allegh Coal Co. Inc., 3 FMSHRC 1392 (June 1981). See also Sewell Coal Co., 5 FMSHRC 2026 (December 1983). We agree with the judge that Westmoreland failed to establish this defense.

The diminution of safety defense that has been recognized by the Commission is extremely narrow. As the Commission stressed in Penn Allegh and Sewell, the Act's enforcement scheme is premised on the proposition that compliance with mandatory standards adopted by the Secretary will protect, not endanger, miners. For this reason, and because the Act itself provides specific detailed procedures for modifying the application of a standard in light of special circumstances that might exist at a particular mine, the Commission rejected the argument that an operator can unilaterally determine that a mining operation can be conducted in a safer manner by foregoing compliance with the requirements of a mandatory standard. 3/ Therefore, whenever this defense is raised in an enforcement proceeding it must be closely scrutinized and each of the elements must be supported with clear proof.

3/ In Sewell the Commission recognized a potential exception to the need for applying for a modification in "emergency situations ... where the gravity of circumstances and presence of danger may require an immediate response by the operator ... necessitating a departure from the terms of a mandatory standard." 5 FMSHRC at 2020, n.2. No such emergency situation was presented on these facts.

In rejecting the operator's defense in this case the judge found, among other things, that Westmoreland failed to establish "that it was necessary in the first instance to have required the miners to have erected a stopping beneath the overhanging brow." 5 FMSHRC at 136. We agree and find it sufficient to affirm the judge's rejection of the defense on this basis. A consistent thread throughout the miners' testimony was that until they actually broke through into the "old works" they were unaware that the overhanging rib was present above the area where the plans called for the stopping to be erected. The record gives no indication that upon subsequent discovery of this fact any further thought was given or discussion held regarding whether the ventilation problem being addressed could be resolved in some fashion other than by building a stopping underneath the overhanging rib. Rather, the operator's employees simply proceeded on the same course of action that had been assigned before the potential danger was discovered. The lack of evidence in the record concerning consideration of possible alternatives to building the stopping below the overhanging rib, which we determined above to have violated the applicable mandatory standard, defeats the operator's diminution of safety defense.

Finally, Westmoreland asserts that the judge erroneously concluded that the violation was the result of Westmoreland's "unwarrantable failure to comply with the standard. The judge found, "[T]hat (foreman) Hairston had knowledge of the violative condition but failed to correct that condit through indifference or lack of reasonable care." 5 FMSHRC at 137. We fi that this conclusion not only lacks substantial support in the record, it is contrary to the overwhelming weight of the evidence.

The record reflects that each and every miner who observed the formation before it fell, including the foreman, attempted to bar it down -- an accepted and commonly used method to determine the presence of and to eliminate dangerous ground conditions. The crew also attempted to secure the formation with roof bolts and to dislodge it by exerting pressure on it with the roof bolter's hydraulic canopy. The crew was composed of miners with many years of experience and they attested to the safety consciousness of their foreman. Each of these miners concluded, based on their repeated unsuccessful attempts to dislodge the coal, that the rib was safe. Given the repeated efforts to remove the formation and the consequent good faith belief on the part of all concerned that the formation posed no hazard, we cannot conclude that the foreman's actions in allowing the work to proceed represents the degree of aggravated conduct intended to constitute an unwarrantable failure under the Act. Although we have held that the record fails to establish that Westmoreland had no option other than building a stopping in this location, on these facts we also must conclude that the violation that occurred did not result from Westmoreland's indifference, willful intent, or serious lack of reasonable care. See generally U.S. Steel Corp., 6 FMSHRC 1423, 1437 (June 1984). Accordingly, we hold as a matter of law, that the violation was not caused by Westmoreland's unwarrantable failure and we reverse the judge's contrary finding.

Because the judge's penalty assessment rested in part on his determination that the foreman acted with indifference and without reasonable care, the case is remanded to the judge for reconsideration of the amount of civil penalty in light of our decision. In all other respects the decision of the judge is affirmed insofar as it is consistent with this decision. 4/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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September 30, 1985

CHAPMAN MERRELL	:	
	:	
v.	:	Docket No. KENT 84-250-D
	:	
PEABODY COAL COMPANY	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

Peabody Coal Company ("Peabody") has applied for interlocutory review of a Commission administrative law judge's order denying Peabody's motion to dismiss a discrimination complaint filed by complainant, Chapman Merrell. The complaint alleges that Peabody violated section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. § 815(c), when it bypassed for rehire the laid-off complainant (Merrell), because he had not obtained relevant health and safety training specified in section 115 of the Mine Act, 30 U.S.C. § 825, and 30 C.F.R. Part 48. Peabody filed a motion to dismiss the complaint for lack of timeliness in filing. The judge denied the motion on the grounds that the late filing was justified and that Peabody suffered no prejudice resulting from the delay. On March 28, 1985, the Commission granted Peabody's petition for interlocutory review and stayed further proceedings until otherwise ordered.

In Peabody Coal Company, KENT 82-103-D, etc., 7 FMSHRC__ (September 30, 1985), and Jim Walter Resources, Inc., SE 84-31-D, etc., 7 FMSHRC __ (September 30, 1985), we examined the substantive issue presented in this case: whether an operator violates section 105(c) of the Mine Act when it bypasses for hire laid-off individuals who lack relevant health and safety training. We held that such a policy does not violate section 105(c).

Accordingly, and without reaching the question of whether the judge erred in denying Peabody's motion, we conclude that Mr. Merrel's complaint fails to state a claim upon which relief may be granted, and we dismiss the case. 1/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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September 30, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of	:	
I. B. ACTON	:	Docket Nos. SE 84-31-D
GRADY ADERHOLT	:	SE 84-32-D
FREEMAN BUTLER	:	SE 84-33-D
JAMES L. CAMPBELL	:	SE 84-34-D
J. D. ELLENBERG	:	SE 84-35-D
W. D. FRANKLIN	:	SE 84-36-D
BILLY R. GLOVER	:	SE 84-37-D
TERRY PEOPLES	:	SE 84-39-D
WILLIAM REID	:	SE 84-40-D
CHARLES W. RICKER	:	SE 84-41-D
TERRY SHUBERT	:	SE 84-42-D
THEODORE TAYLOR	:	SE 84-43-D
MARVIN WISE	:	SE 84-44-D
CHARLES BLACKWELL	:	SE 84-45-D
ROBERT BURLESON	:	SE 84-46-D
HOUSTON EVANS	:	SE 84-47-D
KENNETH RANDALL COFER	:	SE 84-52-D
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA)	:	
v.	:	
JIM WALTER RESOURCES, INC.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissi

DECISION

BY THE COMMISSION:

These consolidated cases arise under the Federal Mine Safety Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The primary presented is identical to the issue addressed in a decision issue same date in United Mine Workers of America on behalf of James Ro v. Peabody Coal Co., Docket No. KENT 82-103-D, etc., and Secretar on behalf of Thomas Williams v. Peabody Coal Co., Docket No. LAKE 7 FMSHRC ___: Does an operator violate section 105(c) of the Min

it bypasses for rehire a laid-off individual because the individual lacks health and safety training as specified in section 115 of the Act and 30 C.F.R. Part 48? 1/ A Commission administrative law judge found that

1/ Section 115 states in part:

(a) Approved program; regulation

Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that --

(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this [Act], use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this [Act], use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;

(4) any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;

(Footnote continued)

Jim Walter Resources Inc. ("JWR") did not violate section 105(c) of the Act by requiring laid-off individuals to obtain training as a condition of recall. The judge held that "pre-employment training and experience criteria may be used by the mine operator, including the requirement that the prospective underground miners have completed their MSHA-approved safet training, without running afoul of the Act." 6 FMSHRC 2450, 2453 (October 1984)(ALJ). The judge also concluded, however, that JWR violated section 105(c)(1) of the Act by failing to compensate certain rehired complainants in these cases for training which the miners had obtained on their own, while relying on that same training to satisfy its statutory obligations as an operator under section 115 to provide training for "new miners." 2/ The judge's conclusions are consistent with our holdings in Peabody and, accordingly, are affirmed.

Fn. 1/ end

> (5) any training required by paragraphs (1), (2) or (4) shall include a period of training as closely related as is practicable to the work in which the miner is to be engaged.
>
> (b) Training compensation
>
> Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.
>
> * * *

30 U.S.C. § 825.

30 C.F.R. Part 48 implements section 115 of the Mine Act. Part 48 was promulgated by the Secretary of Labor and it sets forth the training requirements for miners as well as the compensation requirements for miners' training and retraining.

2/ Section 105(c)(1) provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner,

(Footnote continued)

The 17 complainants in these consolidated cases were employed by JWR in surface mining positions at JWR's Flat Top/Nebo and No. 7 mines. In January and February of 1983, JWR conducted a reduction in force pursuant to which the complainants were laid off from their surface positions. The parties do not dispute that the layoffs were instituted for valid business reasons. Under Articles XVII(c) and (d) of the National Bituminous Coal Wage Agreement of 1981 ("the Agreement"), to which both the United Mine Workers of America ("UMWA") and JWR were parties at the time of the layoffs, each complainant was placed on a layoff panel and was required to list on his panel form the jobs that he was able to perform and to which he wished to be recalled. 3/

Fn. 2/ end

representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1).

3/ Article XVII states in part:

(c) Layoff Procedure

In all cases where the working force is to be reduced or realigned, management shall meet with the mine committee at least 24 hours in advance and review the available jobs and the individuals to be laid off, retained or realigned.

Within five (5) days after an Employee is notified that he is to be laid off, he must fill out a standardized form and submit it to mine management. On this form, the laid-off Employee shall list: (1) his years of service at the mine; (2) his years of service with the Employer; (3) his previous mining experience with other Employers and the years of service with each; and (4) the jobs he is able to perform and for which he wishes to be recalled.

* * *

(Footnote continued)

However, instead of recalling laid-off individuals strictly in accordance with the order in which their names appeared on the seniority list, JWR bypassed certain individuals and recalled others who had shorter terms of prior service but who had completed the health and safety training specified in section 115 for underground mining work. 4/ (The majority of jobs filled by recall were underground positions.) Seventeen of the laid-off individuals who were bypassed filed discrimination complaints with the Secretary of Labor. In turn, the Secretary filed complaints on their behalf with this independent Commission. 30 U.S.C. § 815(c)(2).

Fn. 3/ end

(d) Panels

> Employees who are idle because of reduction in the working force shall be placed on a panel from which they shall be returned to employment on the basis of seniority as outlined in section (a).

Article XVII(a) defines "seniority" in part as follows:

> Seniority at the mine shall be recognized in the industry on the following basis: length of service and the ability to step into and perform the work of the job at the time the job is awarded.

Article XVII(h) of the Agreement states in part:

Recall of Persons on Layoff Status

> When a job or training vacancy at a mine exists which is not filled by Employees within the active working force or from the mine panel, the panel custodians will review the list of Employees on the panel from other mines and the Employer shall recall to employment Employees on layoff status in the following order:
>
> (1) If there are no Employees on the mine panel with the ability to perform the work of the job, then, the Employer shall recall the senior Employee who has such ability from the Employer's other mines within the same UMWA district who has requested his name to be placed on the panel at that mine and has listed the job to be filled as one for which he wishes to be recalled....
>
> (2) If there are no Employees on the mine panel or the District-Employer panel, who have the ability to perform the work of the job, then, the Employer shall recall the senior Employee from the Employer's other mines outside the UMWA District where the mine is located who has such ability....

did not obtain the training on their own or who obtained underground training but were not recalled. Group II consists of 13 complainants who were bypassed for recall, obtained underground training on their own, were eventually rehired by JWR to work underground but were not compensated for expenses incurred in securing the training.

In the discrimination complaints, the Secretary alleged that JWR refused to recall each of the complainants according to their seniority, as provided by the Agreement, for the sole reason that JWR otherwise would have been obligated to provide the training mandated by section 115 of the Mine Act and 30 C.F.R. Part 48. The Secretary asserted that this policy was a violation of section 105(c) of the Act and that the complainants were entitled to back pay for the time they were laid off because of the bypass, in addition to reimbursement with interest for the training that they had acquired on their own. 5/

In Secretary of Labor on behalf of Bennett, et al. v. Emery Mining Corporation, 5 FMSHRC 1391 (August 1983), pet. for review filed, No. 83-2017 (10th Cir. August 17, 1983), the Commission held that section 115 does not restrict the prerogative of a mine operator to set pre-employment qualifications based upon training and that requiring applicants for employment to obtain the training specified in section 115 of the Act prior to hire does not violate the Act. We also held, however, that the operator in that case, having relied upon the newly hired miners' prehire training to satisfy its statutory training obligation towards "new miners," could not refuse to reimburse those miners for the expense of such training. 5 FMSHRC at 1396. In the present case, the judge held that it was "immaterial whether the affected applicants for employment are strangers to the industry and the employer, as in the Emery case, or are former employees awaiting ... recall...." 6 FMSHRC at 2453. He found that in either case the operator could require the completion of relevant safety training as a pre-condition to hire. Consistent with Emery, he also held that an operator must reimburse a new miner if the operator

5/ Four of the Group II complainants also invoked the grievance procedures provided in Article XXIII of the Agreement to challenge JWR's recall policy. They alleged that JWR's practice of recalling less senior miners was a breach of the Agreement. An arbitrator concluded that the grievants lacked the ability to perform the duties of the jobs to which the grievants claimed they were entitled because they did not have the requisite training. Therefore, the arbitrator held that the grievants did not possess the appropriate "seniority" in that they "lacked the ability to step in and perform the job at the time the job is awarded" and that their bypass did not breach the Agreement. In the matter of the Arbitration between Jim Walter Resources, Inc., Flat Top/Nebo Facilities and United Mine Workers of America, District 20, Local Union No. 6255, Arb. No. 2 JWR 81-20,83-142 (1983) (Clarke, Arb.).

relies upon that individual's prehire training to satisfy its statutory training obligations. 6 FMSHRC at 2454. The judge found no need to resort to the Agreement to determine the validity of JWR's policy under the Act. 6 FMSHRC at 2453.

In Peabody Coal, supra, we examined fully the question of whether an operator violates section 105(c) of the Mine Act when it bypasses for hire laid-off individuals who lack relevant health and safety training. We answered the question in the negative. We held that under the Mine Act laid-off individuals are not "miners" or "new miners" entitled to section 115 training. For the reasons articulated in Peabody, we reach the same result here.

As explained in Peabody, we view any rights of recall from layoff, and the extent to which an operator may agree to condition those rights, as being the proper subjects of collective bargaining and arbitration, rather than of litigation under the Mine Act. In Peabody, we also reaffirmed the conclusion we reached in Emery that if an operator relies upon the training of those whom it subsequently hires, it must compensate them for the time and expense of their prehire training. 6/ JWR invites us to reconsider this latter conclusion. We decline to do so.

The judge awarded costs and damages, ordered the parties to calculate interest on the awards and to submit an agreement, along with a petition for attorney's fees, within 20 days. 6 FMSHRC at 2457. The parties failed to respond within the specified time and the judge made final his original award of costs and damages. 6 FMSHRC at 2650. Interest is ordinarily part of the "full measure of relief" to which complainants are entitled under section 105(c)(1) of the Mine Act. Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co. and Michael Walker, 5 FMSHRC 2042, 2049 (December 1983). There is an obligation, however, on the part of counsel representing such complainants to conduct the litigation through which miners secure the relief to which they are entitled in accordance with orders issued by the presiding judge. The order issued here directing the parties to submit interest computations was entirely appropriate. We acknowledge that a judge has the authority to decline to make an award if a party's representative refuses to submit required information. Here, however, the judge's order imposed obligations on counsel for the operator

6/ JWR argues further that the Secretary erred by not filing separate complaints of discrimination alleging JWR's failure to reimburse the complainants for training expenses and for compensable wages during the training period. Because the complainants are challenging JWR's policy that safety training is a proper pre-employment requirement for a laid-off miner, the allegation with regard to the failure to compensate is interrelated with the policy challenge. Under these circumstances, we will not require separate discrimination complaints.

as well as counsel for the miners. Therefore, we will not penalize the miners in this case for the failure of counsel on both sides to see that the terms of the judge's order were met. We remand this matter for the calculation of attorney's fees and the interest due on the costs and damages awarded. 7/

On the foregoing bases, the judge's decision is affirmed. The case is remanded for the further remedial findings specified above. 8/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

7/ As an attachment to his brief on review, the Secretary filed with the Commission a document entitled, "MSHA Policy Memorandum No. 83-280, Mine Operators' Responsibilities for Safety Training Under Section 115 of the Federal Mine Safety and Health Act of 1977 and 30 C.F.R. Part 48." JWR has moved to strike the document. The motion is denied. The memorandum is a public document of MSHA and, as such, its existence and contents are subject to our judicial notice.

8/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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September 30, 1985

UNITED MINE WORKERS OF AMERICA (UMWA)	:	
on behalf of JAMES ROWE, et al., JERRY D. MOORE, LARRY D. KESSINGER	:	Docket Nos. KENT 82-103-D KENT 82-105-D KENT 82-106-D
v.	:	
PEABODY COAL COMPANY	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
on behalf of THOMAS L. WILLIAMS	:	Docket No. LAKE 83-69-D
v.	:	
PEABODY COAL COMPANY	:	

Before: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

These consolidated discrimination complaints arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The essential issue presented on review is whether Peabody Coal Company ("Peabody") violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), when it bypassed for rehire the laid-off complainants, who were otherwise eligible for recall under pertinent collective bargaining agreement provisions, because they had not obtained relevant health and safety training specified in section 115 of the Act, 30 U.S.C. § 825, and 30 C.F.R. Part 48. 1/ The Commission's Chief Administrative Law Judge concluded that,

1/ Section 115 states in part:

(a) Approved program; regulations

Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that --

 (Footnote 1 continued)

Footnote 1/ continued

(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this [Act], use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this [Act], use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;

(4) any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;

(5) any training required by paragraphs (1), (2) or (4) shall include a period of training as closely related as is practicable to the work in which the miner is to be engaged.

(Footnote 1 continued)

These cases involve four discrimination complaints. Docket No. LAKE 83-69-D is a complaint of discrimination filed by the Secretary of Labor on behalf of Thomas L. Williams, who was on layoff and who had worked previously as a miner for Peabody at its Sunnyhill No. 9 South Mine. Docket Nos. KENT 82-105-D and KENT 82-106-D are complaints brought by the United Mine Workers of America ("UMWA") under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), on behalf of Jerry D. Moore and Larry D. Kessinger, who were also on layoff and who had been employed formerly as miners by Peabody at its Eagle No. 2 Mine. (The Sunnyhill No. 9 South and the Eagle No. 2 Mines are part of Peabody's Eastern Division.) Finally, Docket No. KENT 82-103-D is a complaint of discrimination filed by the UMWA as a class action on behalf of James Rowe and all laid-off individuals employed previously as miners in Peabody's Eastern Division.

Prior to July 1981 and the events which gave rise to this litigation, Peabody provided to its miners, following their rehire from layoff status, the training required for "new miners" under the Mine Act and the Secretary of Labor's implementing regulations. On July 6, 1981, however, Peabody instituted a new policy requiring laid-off individuals to obtain such training on their own. Under the new policy, those laid-off individuals who failed to obtain the training would be bypassed, when reached on a recall panel, in favor of panel members whose training was current. The recall panels were established as part of the National Bituminous Coal Wage Agreement of 1981 ("the Agreement"), to which Peabody and the UMWA were parties. Article XVII(d) of the Agreement provided:

> Employees who are idle because of a reduction in the working force shall be placed on a panel from which they shall be returned to employment on the basis of

---

Footnote 1/ end

(b) Training compensation

Any health and safety training provided under subsection (a) of this section shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

* * *

30 U.S.C. § 825.

30 C.F.R. Part 48 implements section 115 of the Act. Part 48 sets forth the training requirements for miners, as well as the requirements for the compensation of miners for training and retraining.

seniority as outlined in section (a). A panel member shall be considered for every job which he has listed on his layoff form as one to which he wishes to be recalled.

"Seniority" was defined in Article XVII(a) of the Agreement as "length of service and ability to step into and perform the work of the job at the time the job is awarded." Under Peabody's new policy, a laid-off individual who had not obtained the relevant health and safety training when he was reached for a vacant position was considered unable to "step into and perform the work of the job" at the time the job was awarded.

On January 3, 1983, the Department of Labor's Mine Safety and Health Administration ("MSHA") notified Peabody that it considered the new recall policy inconsistent with the training requirements of the Mine Act and 30 C.F.R. Part 48. Subsequently, MSHA revoked approval of the training plans in effect at two of Peabody's mines and cited Peabody for violating the Act and 30 C.F.R. Part 48. Peabody then discontinued its policy and returned to its prior practice of recalling the most senior individual on the recall panel and providing training upon rehire. After the citations were terminated, those individuals who, as a result of Peabody's policy, had obtained training on their own time and expense and had been recalled to work, were compensated by Peabody for their training expenses.

The named complainants in the present discrimination complaints had worked previously as underground miners and had sought recall at Peabody's surface facilities. They had not obtained the surface "new miner" trainin and, under Peabody's policy, had been bypassed when reached on the recall panel. The complainants alleged that it was Peabody's responsibility to provide training after rehire and that, by denying reemployment because they were not trained, Peabody engaged in discrimination in violation of section 105(c)(1) of the Act. 2/

2/ Section 105(c)(1) provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a

(Footnote 2 continued)

In his decision, the judge agreed with the named complainants. 3/ The judge found that section 115 of the Mine Act establishes the right of miners to receive health and safety training and the corresponding obligation of the operator to provide and pay for the training. Because the Mine Act and its legislative history do not address the situation of individuals on layoff, the judge took account of relevant provisions of the parties' Agreement dealing with laid-off individuals. He concluded that, in light of the Agreement, a laid-off individual was more than just a "preferred job applicant":

> [T]he rights accorded a laid off miner under the collective bargaining agreement contain indicia of an ongoing employment relationship sufficient for him to be considered a miner within the purview of section 115 and 105(c) of the Act.

6 FMSHRC at 1648.

Footnote 2 continued

> coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1).

3/ In the litigation before the judge, the complainants were divided into three categories: Category I consists of those individuals who had obtained training on their own time and at their own expense, and who were recalled to work. Peabody and the UMWA settled the claims of these miners with the approval of the judge. Category II complainants, the named complainants, are those individuals who were bypassed on the recall panel because the operator determined that they would need additional training in order to fill the available jobs. Category III, covered by the class action in Docket No. KENT 82-103-D, consists of those individuals who, as a result of the operator's policy, had obtained training on their own time and at their own expense, but whose names were not reached on the recall panel because of their relatively shorter length of service.

Mine Act, including the right to receive training from the operator. The judge ordered Peabody to reinstate the named complainants to the jobs that they would have had but for the discriminatory training policy. In Docket No. KENT 82-103-D, the judge dismissed the complaint on the grounds that the UMWA had failed to satisfy requisite criteria for maintaining a class action. With regard to the Category III complainants, the judge found that the right to a job was predicated upon being reached on the recall panel. Therefore, because the Category III complainants had no right to a job, the judge held that they had no right to training. 6 FMSHRC at 1649. Given our disposition of this case, we agree in result with the judge as to the claims of any individual in Category III. Subsequently, the judge awarded damages and attorney's fees, and assessed civil penalties for the violations of section 105(c). 6 FMSHRC 1920 (August 1984)(ALJ).

In Secretary of Labor, on behalf of Bennett, et al. v. Emery Mining Corp., 5 FMSHRC 1391 (August 1983), pet. for review filed, No. 83-2017 (10th Cir. August 17, 1983), the Commission examined the rights granted and the obligations imposed by section 115. The Commission found that section 115 affords newly hired miners two separate, related rights: the right to receiv after hire the safety training specified in that provision and the right to be compensated for such training. 5 FMSHRC at 1394-96. As a corollary to these rights, the Commission further concluded that section 115 imposes upon operators the duty to provide new miners with the required training. Id. The Commission determined also that section 105(c) prohibits denial of, or interference with, these rights. 5 FMSHRC at 1395-96.

In Emery, the operator had refused to hire job applicants who had not obtained the health and safety training specified in section 115 on their own time and at their own expense. The operator also refused to reimburse those whom it hired for their expenses in obtaining such training. The Commission found that Emery's policy requiring job applicants to obtain training on their own, as a qualification for employment, did not violate section 105(c) of the Act. The Commission held, however, that Emery's failure to reimburse those whom it subsequently hired for their prehire training expenses, while relying on that training to satisfy its own statutory obligation to provide training for new miners, violated the Act. 5 FMSHRC at 1396. Central to the holding in Emery was the recognition that section 115 neither dictates whom an operator should hire, nor refers to qualifications for hire. As stated in Emery, "[I]n the Mine Act Congress did not restrict a mine operator's prerogative of setting pre-employment qualifications based on experience or training." 5 FMSHRC at 1395-96. On the other hand, it was recognized that the operator's statutory obligation to provide and bear the cost of training for new miners could not be circumvented by relying on newly hired miners' prehire training, obtained as a result of that operator's hiring policies, while refusing to reimburse new miners for the expense of such training.

In the present case, the complainants are individuals who have been laid off by Peabody and who worked previously for the operator as miners.

The parties agree that the layoffs resulted from bona fide business objectives. There is no suggestion that Peabody's motivation for the layoffs was retaliatory. Peabody's policy with respect to hiring laid-off individuals was similar to Emery's policy with respect to hiring new job applicants. Both operators conditioned employment upon the prospective employee first acquiring his own training. However, unlike Emery, Peabody reimbursed the employees it hired for the expense of the training.

We conclude that Peabody's policy requiring laid-off individuals to obtain training prior to rehire does not violate the Act. 4/ As the judge noted, the Act and its legislative history do not address the rights of laid-off individuals or the obligations of operators with regard to the recall of laid-off individuals. Section 115 contains no priorities with respect to the recall of former employees. Moreover, nothing in the legislative history indicates that Congress intended section 115 to dictate to operators whom they must recall--any more than it dictates whom they must hire.

Section 115 grants training rights to "new miners" and "miners." We conclude that, consistent with the rationale underlying Emery, under the Mine Act it is upon being rehired that laid-off individuals become entitled to the rights granted by section 115. At that point they once again become "miners" within the meaning of section 115 and as defined by section 3(g) of the Act. 5/ There being no statutory right to training for those on layoff status, refusal to rehire for lack of required training does not violate section 105(c). This result is consonant with the holding in Emery. 6/

Our holding does not mean that an operator is without obligations regarding the training of previously laid-off individuals after they have been rehired. As in Emery, we conclude that section 115 requires

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4/ Our decision is consistent with the administrative law judges' decisions in United Mine Workers of America, on behalf of Delmar Shepard v. Peabody Coal Company, 4 FMSHRC 1338 (July 1982)(ALJ) and Secretary of Labor,(MSHA) on behalf of I.B. Acton et al. and UMWA v. Jim Walter Resources, Inc., 6 FMSHRC 2450 (October 1984)(ALJ).

5/ Section 3(g) of the Act provides:

For the purpose of this Act, the term --

* * *

"miner" means any individual working in a coal or other mine....

30 U.S.C. § 802(g).

6/ Our decision is based on the statute. There is no relevant training regulation bearing directly on the issue, for none of the Secretary's otherwise extensive safety training regulations at 30 C.F.R. Part 48 addresses the subject of laid-off individuals. Cf. Emery, 5 FMSHRC at 1398.

"new miners," must reimburse the miners for the expense of their training. Failure to do so would circumvent the intent and mandate of section 115(b) that operators provide and pay for new miners' training. In the present case, Peabody has fulfilled this obligation.

Underlying our holding is our belief that the Mine Act is not an employment statute. The Act's concerns are the health and the safety of the nation's miners. In enacting section 115 Congress was intent upon preventing "the presence of miners ... in a dangerous mine environment who have not had ... training in self preservation and safety practices." S. Rep. No. 181, 95th Cong., 1st Sess. 50 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637-38 (1978)("Legis. Hist."). Those individuals employed at a mine are to be trained before they begin work so that once they begin work accidents are less likely to occur. See National Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 710 (3d Cir. 1979). Peabody's policy of hiring individuals who have maintained their trained status is consistent with this objective and with section 115 as written.

The administrative law judge looked beyond the Mine Act to the parties' private collective bargaining agreement in order to interpret section 115. We are not prepared to interpret the rights and obligations mandated by the Act through interpretation of a private contractual agreement unless required to do so by the Act itself. See Local Union No. 781, District 17, United Mine Workers of America v. Eastern Associated Coal Corp. 3 FMSHRC 1175, 1179 (May 1981). Here, nothing mandates that we go beyond the Act and the legislative history to determine whether laid-off individual are entitled to section 115 safety training. The rights of laid-off individuals to recall and the extent to which an operator agrees to limit its right to select the persons it will recall, are the province of collective bargaining and arbitration. Essentially, the dispute between Peabody and the complainants is of a private, contractual nature. The issues raised in such a dispute are appropriately resolved by the grievance-arbitration process. See Local Union 5869, District 17, United Mine Workers of America v. Youngstown Mines Corp., 1 FMSHRC 990, 994 (August 1979). Indeed, prior to this matter reaching the Commission, the issue of the validity of Peabody's recall policy under the applicable bargaining agreement was arbitrated several times, and Peabody's policy was upheld. 7/

We recognize that under the National Labor Relations Act and the Railway Labor Act, statutes governing labor-management relations, laid-off employees in general and laid-off employees with a right to reinstatement based upon seniority have been held to be entitled to certain rights granted by those acts. See, e.g., Kustom Electronics, Inc. v. NLRB, 590 F.2d 817, 821-22 (10th Cir. 1978); Nashville, C.& St. L. Ry. v. Railway Employees' Department of American Federation of Labor, 93 F.2d 340, 343-44 (6th Cir. 1937). For example, the courts have found laid-off employees' interest in negotiations affecting wages, hours, and other conditions of employment

7/ See e.g., Peabody Coal Co. and UMWA, District 23, Local Union 9800, ARB No. 78-23-81-274, at 5-6 (March 17, 1981); Peabody Coal Co. and UMWA, District 6, Local Union 1340, ARB. No. 81-6-83-637, at 17-20 (March 29, 198

to be such that the laid-off employees are entitled to participate in bargaining unit representation elections. However, these cases arise under statutes whose very purpose is the governance of labor-management relations. The cited cases deal with rights central to that purpose--participation in th collective bargaining process. The entirely discrete purpose of the Mine Act and the nature of the rights granted by section 115, prevent us from transferring this reasoning to the Mine Act.

On the bases explained above, we reverse the conclusion of the administrative law judge that Peabody discriminated against the named complainants in Docket Nos. KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D, by violating their asserted statutory rights with regard to training, and we dismiss the complaints. Because we conclude that Peabody's policy of bypassing laid-off individuals whose training was not current does not contravene the Act, we affirm the judge's dismissal of the complaint in Docket No. KENT 82-103-D without reaching the question of whether the judge properly concluded that the UMWA had failed to meet certain requisites for a valid class action. Finally, the judge's order awarding damages and attorney's fees, and assessing civil penalties is vacated. 8/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

8/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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September 30, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 82-106
CARBON COUNTY COAL COMPANY	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), is before the Commission on interlocutory review for a second time. Carbon County Coal Company ("Carbon County") seeks review of an order of a Commission administrative law judge denying the company's motion for summary decision. For the reasons that follow, we vacate the judge's order, grant Carbon County's motion for summary decision, and dismiss the proceeding.

This case arises out of a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") on August 24, 1981, alleging that Carbon County operated the Carbon No. 1 Mine without an approved ventilation system and methane and dust control plan in violation of 30 C.F.R. § 75.316. The standard provides in part:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form.... Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Prior to March 1981, Carbon County operated the Carbon No. 1 Mine under a plan approved by the Secretary of Labor. However, in March 1981, when that plan came up for the six-month review as provided by the standard, Carbon County proposed a revision of the plan that MSHA, acting on behalf of the Secretary, found unacceptable. Carbon County proposed

of the fans. MSHA, however, insisted that the auxiliary fans be provided with a volume of air greater than their "free discharge capacity." 1/

The parties communicated concerning the two proposals, but could not agree on which provision should be included in the plan. On July 27, 1981, MSHA advised Carbon County that if an acceptable plan was not received by August 12, 1981, approval for the ventilation system and methane and dust control plan then in effect would be revoked and further mining activity would be prohibited. Carbon County continued to insist upon the installed capacity provision, and MSHA revoked the plan in effect at the Carbon No. 1 Mine. When, in the face of MSHA's revocation of its plan, Carbon County continued to operate the mine, MSHA issued a citation asserting that Carbon County was in violation of section 75.316. The citation was followed by an order of withdrawal prohibiting any further mining of coal. After the issuance of the closure order, Carbon County adopted the free discharge capacity provision as part of its ventilation and methane and dust control plan. As a result, the withdrawal order was terminated, the violation of section 75.316 was deemed abated, and the mining of coal was resumed. This civil penalty proceeding ensued.

At the close of pretrial discovery, Carbon County moved for summary decision under Commission Procedural Rule 64. 29 C.F.R. § 2700.64. 2/ Carbon County argued that it was not in violation of section 75.316 because MSHA had sought to impose the free discharge capacity provision

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1/ "Installed capacity" is the ventilation capacity of an auxiliary fan when the fan is operated with tubing attached to it. Knepp dep. at 19. "Free discharge capacity" is the ventilation capacity of an auxiliary fan when the fan is operated without tubing attached. Knepp dep. at 16. The tubing extends from the fan to the face area. The fan pulls the air at the face area through the tubing and exhausts the face air into the return air. In this way dust generated by the mining process and gases liberated in the face area are removed from the mining section.

2/ 29 C.F.R. § 2700.64 states in part:

> a. Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the Judge to render summary decision disposing of all or part of the proceeding.
>
> b. Grounds. A motion for summary decision should be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

as a general provision without regard to particular conditions at the Carbon County No. 1 Mine, violating the principles controlling the ventilation plan approval and adoption process as set forth in Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). 3/ In an unpublished order, the judge denied Carbon County's motion for summary decision. The judge did not address the issues raised by Carbon County--whether undisputed material facts in the record established that MSHA had insisted upon the free discharge capacity provision without regard to the particular circumstances at the mine and, if so, whether the citation should be vacated. Rather, the judge viewed the controlling issue as relating to the merits of the two proposals and requiring a determination as to which proposal was safer.

Carbon County was granted interlocutory review by the Commission of the judge's order. On review, and following oral argument attended by the parties and by amicus, the American Mining Congress, the Commission concluded that the judge had erred. Carbon County Coal Co., 6 FMSHRC 1123 (May 1984). The Commission held the court's discussion in Zeigler of the legal principles governing the ventilation plan approval and adoption process to be controlling, and stated, "if MSHA's insistence in this case upon inclusion of the free discharge capacity provision in Carbon County's plan contravened the principles of Zeigler, the citation and withdrawal order issued to Carbon County cannot stand.... [I]t is incumbent on the judge ... to first consider and rule on Carbon County's arguments in its summary decision motion concerning the application of Zeigler to the facts at hand." 6 FMSHRC at 1127. The Commission vacated the judge's denial of Carbon County's motion for summary decision and remanded the matter to the judge for reconsideration.

On remand the judge again denied the operator's summary decision motion. He stated that at trial it would be necessary to determine the proper volume of air to be supplied to the auxiliary fans and that this determination would be dictated by his conclusion as to which proposal was safer. The judge added, "the ... language of the Zeigler case should not be allowed to stand in the way of mine safety." 6 FMSHRC 1607, 1610 (July 1984)(ALJ). Carbon County's second petition for interlocutory review followed. 4/

3/ In Zeigler, which arose under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977), the court construed section 303(o) of that Act. This provision was retained without change as section 303(o) of the 1977 Mine Act.

4/ Carbon County was granted a suspension of the proceedings before the judge pending our decision in this matter.

As noted, the institution of a ventilation and methane and dust control plan through the process of Secretarial approval and operator adoption is mandated by section 303(o) of the Mine Act, 30 U.S.C. § 863(o), and by mandatory safety standard 30 C.F.R. § 75.316, which standard essentially reiterates section 303(o). Both the Act and the mandatory safety standard state that the purpose of the approval-adoption process is to provide a plan whose provisions are "suitable to the conditions and the mining system of the coal mine." Once the plan is approved and adopted, the particular provisions of the plan are enforceable at the mine as though they are mandatory safety standards. Zeigler Coal Co., 536 F.2d at 409. 5/

The scheme for the approval and adoption of a mine specific plan supplements the nationally applicable mandatory safety and health rulemaking procedures. The bilateral approval-adoption process inherent in developing mine specific plans results from consultation and negotiation between MSHA and only the specifically affected operator, whereas the nationally applicable standards are the product of notice and comment rulemaking pursuant to section 101 of the Mine Act. 30 U.S.C. § 811. Further, the scope of a mine specific plan is restricted exclusively to the mine in which the plan will be implemented, whereas a mandatory safety or health standard applies across-the-board to all mines.

The individual nature of a mine specific plan is emphasized in the legislative history of the Mine Act. The Senate Committee on Human Resources, reporting on the bill which, as amended, became the Mine Act, stated:

> [I]n addition to mandatory standards applicable to all operators, operators are also subject to the requirement set out in the various mine by mine compliance plans required by statute or regulation. The requirements of these plans are enforceable as if they were mandatory standards. Such individually tailored plans, with a nucleus of commonly accepted practices, are the best method of regulating such complex and potentially multifaceted problems as ventilation, roof control and the like.

5/ Safety requirements tailored to particular conditions at a specific mine are not restricted to ventilation and methane and dust control plans. Where safety may be enhanced by taking into account particular local conditions the Mine Act provides for further mine specific plans. For example, 30 C.F.R. § 75.200, which reiterates section 302(a) of the Mine Act, 30 U.S.C. § 862(a), requires the Secretary to approve and the operator to adopt "[a] roof control plan ... suitable to the roof conditions and mining system of each coal mine."

S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 613 (1978).

The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission. Penn Allegh Coal Co., 3 FMSHRC 2767, 2773 (December 1981). Carbon County proceeded accordingly in this case. The company negotiated in good faith and for a reasonable period concerning the volume of air to be supplied the auxiliary fans. Carbon County's refusal to acquiesce in the Secretary's demand that the plan contain a free discharge capacity provision led to this civil penalty proceeding.

The approval-adoption process protects operators and miners by assuring that particular conditions at a mine are addressed by individualized safety requirements. The court in Zeigler, in a discussion we have found "persuasive and compelling," Carbon County Coal Co., 6 FMSHRC at 1127, described the limits the statute places upon the Secretary regarding the restricted subject matter of a ventilation and methane and dust control plan:

> Section 303(o) secifically states that the plan is to be "suitable to the conditions and the mining system of the coal mine...." The context of the plan requirement, amidst the other provisions of § 303, which set forth fairly specific standards pertaining to mine ventilation, further suggests that the plan idea was conceived for a quite narrow and specific purpose. It was not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine.
>
> * * *
>
> [I]nsofar as those plans are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application.

536 F.2d at 407.

administrative law judge insisted on avoiding this determination. We therefore look to the record to determine whether the undisputed material facts establish that the free discharge capacity provision espoused by the Secretary was required because of particular mine specific conditions at the Carbon No. 1 Mine.

II.

The Carbon No. 1 Mine is ventilated by a main mine fan. To assist in the ventilation of the mining sections, 125-horsepower auxiliary exhaust fans are used. An auxiliary exhaust fan ventilates up to 5 working faces. The auxiliary fan is located outby the faces in return air. A fiberglass tube is attached to the fan. This tube connects with up to 5 tubes which extend outby from the faces. In all, less than 500 feet of tubing is attached to the fan. The fan pulls the intake air at the face through the tubing and exhausts it into the return air. In this way the dust which results from the mining process and the gases which are liberated in the face area are removed from the mining section.

It is a principle of physics that in order to work effectively in removing dust and gas from the section the exhaust fan must be supplied with more air than the fan is actually producing. If the fan is supplied with less air than it is producing, the fan will draw air from another source to compensate for the deficiency. That other source may be air which has already passed through the fan into the return. This phenomenon is called "recirculation." The result of recirculation may be that dust and gases, once exhausted through the fan, are returned to the face area.

In 1971, MESA, MSHA's predecessor, issued national guidelines to all of its districts concerning provisions which should be included in ventilation plans. The guideline pertaining to exhaust fans requires that "[f]ans operating exhausting shall be installed in the return air current ... and the volume of ... intake air current available at the entrance of the place ... to be ventilated with exhaust fans shall be greater than the free discharge capacity of the fan." Exhibit 3 at 9. The guideline is intended to prevent recirculation.

In 1977, MSHA District 9 issued its own guidelines "to assist [operators] in formulating an acceptable ventilation ... plan." Exhibit 6. 6/ The guidelines were drafted by District 9 personnel and for the

6/ MSHA divides its division of Coal Mine Health and Safety into 10 administrative districts. District 9 encompasses the Rocky Mountains area and includes the coal producing states of North Dakota, Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Washington and Alaska. There are approximately 48 underground coal mines operating in District 9, including the Carbon No. 1 Mine.

most part reiterated the national guidelines. Differences with the national guidelines were the result of mining conditions unique to District 9. The 1977 District 9 guideline with respect to the volume of air to be supplied to exhaust fans was identical to the national guideline. Exhibit 6 at 10. In 1981 District 9 revised its guideline. However, the provision relating to the air supplied to exhaust fans and thus to the prevention of recirculation remained essentially the same. It states:

> Fans operated exhausting shall be installed in the return air current from the place to be ventilated by the fan, and the volume of intake air delivered to the fan prior to the fan being started shall be greater than the free discharge capacity of the fan.

Exhibit 7 at 4.

In the discovery phase of this litigation, Carbon County deposed the MSHA officials who played a role in rejecting Carbon County's installed capacity proposal and who insisted upon the free discharge capacity provision. The depositions establish that Carbon County's revised ventilation plan was reviewed by Mining Engineer John Widows, by Ventilation Specialist Ival VanHorne, and by Supervisory Mining Engineer Bill Knepp. The plan was given then to Engineering Coordinator Harold Dolan and Dolan forwarded the plan to District Manager John Barton. It was District Manager Barton who ultimately rejected Carbon County's plan on behalf of MSHA and the Secretary of Labor.

We find that the record conclusively establishes that MSHA's insistence upon the free discharge capacity provision and MSHA's rejection of Carbon County's proposal to provide a volume of air equal to the installed capacity of the fans was the result of a rote application of the District 9 free discharge capacity guideline and was not based upon particular conditions at the Carbon No. 1 Mine. Ventilation Specialist VanHorne stated that there was "no leeway" with regard to requiring the free discharge capacity provision in a ventilation and methane and dust control plan and that he considered no factors other than the guideline when reviewing the proposed plan. VanHorne dep. 18-19, 85. Engineering Coordinator Dolan said that he knew of no plan in District 9 which did not have the free discharge capacity requirement and that he would not recommend approval of a plan unless it contained that provision. Dolan dep. at 63-64. Dolan termed the guideline "a bottom line requirement" and stated that although one plan had "gotten through" without it, that plan later was rescinded. Dolan dep. at 106.

District Manager Barton stated that he was free to disregard the guideline--"the guidelines don't dictate to me" -- and that the quantity of air required in a ventilation and methane and dust control plan was determined by "our observation and information about the specific mining conditions at the mine." Barton further stated, however, "I view the principle that you must provide at least an amount of air equal to the

free discharge capacity as necessary. We may ask for more. We will never permit less." Barton dep. at 17, 18-19. When questioned about the circumstances at Carbon County's mine which gave rise to MSHA's insistence upon the free discharge capacity provision, Barton replied, "In my opinion, that was the minimum acceptable level that we could give. That was the most liberal allowance ... that I would make." He was asked whether free discharge capacity was the minimum volume of air that he would allow at all mines, and he replied that it was. Barton dep. at 58. "Particular circumstances" which lead MSHA to insist upon the free discharge capacity provision at the Carbon No. 1 mine were not detailed by Barton.

A recurring theme in the statements of VanHorne, Knepp, Dolan and Barton was that District 9 insisted upon the guideline because of the fear that the tubing attached to the fan might break, or be closed off, or be disconnected, and that in such case the volume of air at installed capacity would not be adequate to prevent recirculation. Despite these concerns, there is no indication in the depositions and the exhibits that any specific breaks, folds, or disconnects in the tubing at the Carbon No. 1 Mine were considered. Nor does the record indicate that Carbon County's proposals for maintaining the tubing to reduce the chances for such occurrences was given fair consideration. Dolan stated that he did not know what the general frequency of tube breaks was, that he did not know if the fiberglass tubing used by Carbon County was more likely to break than other types of tubing, and that he had no specific knowledge about the tubing in Carbon County's mine or the frequency with which it might break. Dolan dep. at 96. Barton stated that miners often damaged ventilation controls like tubing, but he also stated that he did not know if the fiberglas tubing used by Carbon County was frequently damaged because, "I am not present in the mine to see what is occurring every day, nor do I review all the citations that come through the office." Barton dep. at 36. Also, although Barton indicated that in general he believed miners could not be relied upon to maintain the tubing, he stated that he had no knowledge of Carbon County's practices with respect to broken tubing or its practices with respect to the inspection of tubing at the mine. Barton dep. at 28-29, 32, 46.

Another basis offered by the Secretary for rejecting the installed capacity proposal and for insisting upon the free discharge capacity provision consisted of vague references to prior instances of recirculation of air at the mine. But the cause or causes for the recirculation and the particular circumstances surrounding these asserted instances of recirculation were not specified. Dolan, MSHA's engineering coordinator, stated that he did not know if the instances of recirculation in the past had anything to do with the quantity of air reaching the auxiliary fans. Dolan dep. at 48, 112. Barton also stated that he had no knowledge of the specifics of recirculation problems at the mine and did not know if any of the mine's recirculation problems related to the amount of air

provided to auxiliary fans. Barton dep. at 31. When asked whether Carbon County's installed capacity proposal was rejected because the mine had a history of recirculation, Barton did not reply specifically. Rather, he stated, "it was rejected because it did not meet the minimum requirements for a good ventilation system to protect the lives of miners in the mine." Barton dep. at 26.

It bears emphasis that the proper focus at this stage of the proceeding is not upon the merits of the proposals--whether the disputed provision is in fact necessary to prevent recirculation at the Carbon No. 1 Mine and whether the disputed provision is one which must be applied to all mines if recirculation is to be prevented--but rather upon the basis for MSHA's insistence that the free discharge capacity provision is required at the subject mine. Because we conclude that the uncontroverted material facts establish that MSHA's decision to impose the free discharge capacity provision was not based upon particular circumstances at the Carbon No. 1 Mine, but rather was imposed as a general rule applicable to all mines, we hold, for the reasons stated in Zeigler and enunciated here, that MSHA's insistence upon the free discharge capacity provision, MSHA's revocation of Carbon County's ventilation plan, and MSHA's subsequent citation of Carbon County for a violation of section 75.316 were not in accord with applicable Mine Act procedure.

This does not mean that the free discharge capacity provision may not be applied at the Carbon No. 1 Mine. If negotiations on the ventilation plan resume, MSHA may determine, and may be able to establish, that particular conditions at the mine warrant the inclusion of the free discharge capacity provision in the ventilation plan. Also, if MSHA believes the free discharge capacity provision to be of universal application, the Secretary may proceed to rulemaking under section 101 of the Mine Act and promulgate the free discharge capacity provision as a nationally applicable mandatory safety standard.

Accordingly, the order of the administrative law judge denying Carbon County's motion for summary decision is vacated, as is the citation alleging a violation of section 75.316. Summary decision is entered on behalf of Carbon County and the proceeding is dismissed. 7/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

7/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the power of the Commission.

Commissioner Nelson, concurring:

While I am in complete agreement with my colleagues that Carbon County is entitled to summary decision, I am persuaded to reach that result as much by consideration of the practical aspects of this case as I am by the legal analysis displayed in the opinion. I find the procedural track record of this case to be noteworthy. More than three and one-half years have elapsed since the Secretary of Labor initiated this action by filing with the Commission a petition for assessment of a civil penalty, yet this proceeding has not proceeded beyond the discovery stage. This is the second time that this matter has come before us on interlocutory review and, despite our clear instructions to the trial judge in our remand order following the first interlocutory review, no progress has been made in bringing this case to its conclusion. Finally, the administrative law judge to whom the case was assigned originally, and who twice heard Carbon County's motion for summary decision, has retired. Were we to conclude that further proceedings in this matter are required, a remand necessarily would be to a new judge, one unfamiliar with the extensive record. Given the record evidence in favor of Carbon County and given our previous adoption of the D.C. Circuit's decision in Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (1976), I believe that it is time to bring this litigation to a merciful end.

Accordingly, for the reasons appearing in the opinion and for the reasons set forth above, I concur in the awarding of summary decision to Carbon County and in the dismissal of this proceeding.

L. Clair Nelson

L. Clair Nelson, Commissioner

Distribution

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ADMINISTRATIVE LAW JUDGE DECISIONS

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SEP 3 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 85-113 A.C. No. 36-02405-03585
v.	:	
	:	Greenwich Collieries No. 1 Mine
GREENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $1,000 for a violation of section 103(k) of the Act. By motion filed with me on August 20, 1985, pursuant to 29 C.F.R. § 2700.30, the parties seek approval of a proposed settlement disposition of the case, the terms of which require the respondent to pay a civil penalty assessment in the amount of $550 for the violation in question.

Discussion

In support of the proposed settlement disposition of this matter, the parties state that they have discussed the alleged violation and the six statutory criteria stated in section 110(i of the Act. Further, they have submitted a complete discussion and full disclosure as to the facts and circumstances surroundin the issuance of the violation, and they have filed full informa-tion concerning the criteria found in section 110(i).

Petitioner's counsel stated that the section 104(a) Citatio No. 2114018, March 15, 1984, was issued pursuant to section 109(of the Act when the inspector determined that a section foreman entered and worked in an area which was subject to an order of withdrawal issued pursuant to section 103(k). The section foreman was not among those authorized to enter the area under

order. Counsel explains that the original section 103 order was issued on February 16, 1984, following a methane explosion which resulted in three deaths. The order listed who was permitted to enter the area specified, e.g. State and MSHA officials, company representatives and UMWA personnel necessary to conduct rescue operations. Subsequent modifications of the original order created confusion as to what work could be done in the cited area, resulting in the entrance of section foreman Richard Endler into the prohibited area to perform rock dusting. The mine was idle at the time and was not reopened until April due to the ongoing investigation. While it is clear that a violation of section 109(c) occurred, petitioner's counsel believes the assessment of "high" negligence is not warranted. Inasmuch as there was no likelihood of an occurrance, as found by the issuing inspector, and no workers would be affected, counsel asserts further that the proposed amended civil penalty is proper in view of the minimal gravity.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED and the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $550 in satisfaction of the citation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceedi is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Joseph T. Kosek, Jr., Esq., Greenwich Collieries, P.O. Box 367, Ebensburg, PA 15931 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SEP 3

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 85-97-R
	:	Order No. 2412633; 1/17/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Martinka No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 85-218
	:	A.C. No. 46-03805-03652
v.	:	
	:	Martinka No. 1
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: David A. Laing and Gregory W. Swart, Esqs., Alexander, Ebinger, Fisher, McAlister & Lawrenc Columbus, Ohio, for Contestant/Respondent; Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Koutras

Statement of the Case

These consolidated proceedings concern a civil penalty proposal filed by MSHA against the Southern Ohio Coal Company pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalt assessment in the amount of $500 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.303, as stated in a section 104(d)(2) Order No. 2412633, with special "S&S" findings, issued by an MSHA inspector on January 17, 1985. Docket No. WEVA 85-218 is the civil penalty case, and Docket No. WEVA 85-97-R is the contest filed by Southern Ohio Coal Compar challenging the legality of the order and the special "S&S" findings.

The parties engaged in prehearing discovery, and subpoenas were issued compelling the attendance of witnesses at the hearing. However, at the hearing, counsel for the parties advised me that they proposed to resolve the dispute by settlement of the issues involved in the proceedings. Accordingly, the parties were afforded an opportunity to present their arguments in support of the proposed settlement disposition, and I issued a bench decision approving the settlement.

Discussion

The order in question was issued after MSHA Inspector Homer W. Delovich determined that a preshift or onshift inspection was not made at one of the underground working places in the mine. MSHA's counsel explained that a miner wearing a protective helmet suffered minor injuries when he came in contact with a roof bolt and some loose shale fell on him. Counsel contended that had the required examinations been performed, the general roof conditions would have been discovered and corrected prior to anyone working the cited area (Tr. 8, 9). Counsel also indicated that Inspector Delovich confirmed that the required examination had not been conducted, and he did so through interviews with several miners at the mine (Tr. 11).

The operator's counsel pointed out that the miner in question was not seriously injured, and although he left the mine on the day of the incident, he returned to work the next day (Tr. 9). Counsel also asserted that had this case gone to hearing, he would argue that the foreman who made the work assignments on the day in question did not know, nor should have known, that the miner who was injured was in the area in question. Counsel asserted further that the cited area was part of an escapeway which had received its weekly inspection the day prior to the accident (Tr. 11, 12).

Under the terms of the settlement, Southern Ohio Coal Company agreed to pay the full proposed civil penalty assessment of $500. MSHA's counsel asserted that the parties also agreed that the violation would be modified from a section 104(d)(2) order to a section 104(a) citation, and that the inspector's "S&S" finding would stand. Counsel confirmed that based on further information, he has determined that the violation was not an unwarrantable failure and that he had consulted with Inspector Delovich in this regard (Tr. 4, 5). A copy of Inspector Delovich's modification of his order was filed with me after the hearing, and it is a matter of record.

The parties stipulated that Southern Ohio Coal Company is a large mine operator and that the payment of the assessed civil penalty will not adversely affect its ability to continue in business (Tr. 7). They also agreed that the violation was promptly abated in good faith (Tr. 8). MSHA's counsel indicated that the degree of negligence was moderate, and as previously indicated, the injury suffered by the miner was not serious. With regard to the prior history of violations, the operator's counsel stated that based on information provided by the company safety director, he was unaware of any prior violations of section 75.303 for failure to conduct required examinations (Tr. 9)

Conclusion

After careful consideration of all of the arguments presented by the parties in support of their proposed settlement disposition of the civil penalty case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, IT IS APPROVED.

ORDER

The Southern Ohio Coal Company IS ORDERED to pay a civil penalty in the amount of $500 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the dat of this decision. Upon receipt of payment, the civil penalty case is dismissed. The operator's motion to withdraw its contest is granted, and it is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 5 1985

TENNIS R. DANIELS, Complainant	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. KENT 85-86-D
v.	:	
WOODMAN THREE MINING CO., INC., Respondent	:	PIKE CD 85-02 No. 1 Mine

ORDER OF DISMISSAL AND REFERENCE

Before: Judge Kennedy

W. Sidney Trivette, counsel for complainant, having failed to substantiate (1) his excuses for his failure to appear at the hearing in this matter in Paintsville, Kentucky, on Thursday, July 25, 1985, or (2) his failure to file a timely written motion for continuance or dismissal of the captioned matter, it is ORDERED:

1. That the order of July 25, 1985, dismissing this matter be, and hereby is CONFIRMED.

2. That this matter be, and hereby is, REFERRED to the Commission for such action, including the assessment of costs, as it deems appropriate under Rule 80 of the Commission's Rules of Practice.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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SEP 5 1985

HOBET MINING AND CONSTRUCTION COMPANY, Contestant	CONTEST PROCEEDINGS
v.	Docket No. WEVA 84-375-R Citation No. 2146497; 8/7/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket No. WEVA 84-376-R Citation No. 2146498; 8/7/84
	Docket No. WEVA 84-377-R Citation No. 2146499; 8/7/84
	Docket No. WEVA 84-378-R Citation No. 2146500; 8/7/84
	Pine Creek No. 12 Prep Plant
	Docket No. WEVA 84-379-R Citation No. 2146461; 8/1/84
	Docket No. WEVA 84-380-R Citation No. 2146462; 8/1/84
	Docket No. WEVA 84-381-R Citation No. 2146464; 8/1/84
	Docket No. WEVA 84-382-R Citation No. 2146470; 8/2/84
	Docket No. WEVA 84-383-R Citation No. 2146471; 8/2/84
	Docket No. WEVA 84-384-R Citation No. 2146472; 8/2/84
	Docket No. WEVA 84-385-R Citation No. 2146473; 8/2/84
	Docket No. WEVA 84-386-R Citation No. 2146475; 8/2/84
	Docket No. WEVA 84-387-R Citation No. 2146477; 8/2/84

	:	Docket No. WEVA 84-388-R
	:	Citation No. 2146480; 8/2/84
	:	
	:	Docket No. WEVA 84-389-R
	:	Citation No. 2146485; 8/3/84
	:	
	:	Docket No. WEVA 84-390-R
	:	Citation No. 2146489; 8/3/84
	:	
	:	Docket No. WEVA 84-391-R
	:	Citation No. 2146490; 8/3/84
	:	
	:	Docket No. WEVA 84-392-R
	:	Citation No. 2146495; 8/6/84
	:	
	:	Docket No. WEVA 84-393-R
	:	Citation No. 2434601; 8/7/84
	:	
	:	No. 7 Surface Mine
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-410
Petitioner	:	A.C. No. 46-02249-03510
	:	
v.	:	Docket No. WEVA 84-411
	:	A.C. No. 46-02249-03511
HOBET MINING AND CONSTRUC-	:	
TION COMPANY,	:	No. 7 Surface Mine
Respondent	:	
	:	Docket No. WEVA 85-4
	:	A.C. No. 46-06197-03509
	:	
	:	Docket No. WEVA 85-9
	:	A.C. No. 46-06197-03510
	:	
	:	Pine Creek No. 12 Prep. Plant
	:	
	:	Docket No. WEVA 85-10
	:	A.C. No. 46-02249-03512
	:	
	:	No. 7 Surface Mine

CORRECTION TO DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor; Allen R. Prunty, Esq., Jackson, Kelly, Holt & O'Farrell,

Charleston, West Virginia, for Hobet Mining and Construction Company.

Before: Judge Broderick

Page 9 of the Decision issued August 6, 1985 in the abo proceedings is corrected to read as follows:

1. The following citations are AFFIRMED as issued:

a) 2146461
b) 2146471
c) 2146489
d) 2146499
e) 2146464
f) 2146470
g) 2434601
h) 2146497
i) 2146500
j) 2146472
k) 2146480
l) 2146495
m) 2146462 (as modified; not S&S)

2. The following citations are VACATED:

a) 2146490
b) 2146477
c) 2146498
d) 2146473
e) 2146475
f) 2146485

3. Considering the criteria in section 110(i) of the A I conclude that the following civil penalties are appropriat for the violations found herein.

CITATION	30 CFR STANDARD	PENALTY
2146461	77.206(a)	$ 100.00
2146471	77.206	100.00
2146489	77.206	100.00
2146499	77.206	100.00
2146464	77.404(a)	100.00
2146470	77.404(a)	100.00
2434601	77.404(a)	100.00
2146497	77.404(a)	100.00
2146500	77.404(a)	100.00
2146472	77.404(a)	100.00

2146480	77.1608(c)		150.00
2146495	77.1608(b)		200.00
2146462	77.1710(i)		30.00
		TOTAL	$1380.00

James A Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Sheila K. Cronan, Esq., U.S. Department of Labor, Office of Solicitor, 4015 Wilson Blvd., Rm. 1237-A, Arlington, VA 222((Certified Mail)

Allen R. Prunty, Esq., Jackson, Kelly, Holt & O'Farrell, 16(Laidley Tower, P.O. Box 553, Charleston, WV 25322 (Certifie Mail)

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SEP 9 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 85-80-M
	:	A.C. No. 16-00967-05502
v.	:	
	:	Houma Barite Plant
IMCO SERVICES, Respondent	:	

DECISION

Appearances: Chandra V. Fripp, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $74, for a violation of mandatory safety standard 30 C.F.R. § 55.14-3, as stated in a section 104(a), "significant and substantial" Citation No. 2237173, served on the respondent by MSHA Inspector Joe C. McGregor on March 6, 1985. The citation was issued after the inspector found an inadequately guarded belt tail pulley.

The respondent filed a timely answer and contest, and the case was docketed for hearing in New Orleans, Louisiana, during the term August 6-8, 1985, along with several other cases in which the same inspector issued citations.

Issue

The issue presented in this case is whether or not the respondent violated the cited safety standard, and if so, the appropriate civil penalty which should be assessed taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

The citation here charges the respondent with a failure to extend a guard on the primary crusher conveyor belt head and tail pulley for a sufficient distance to prevent someone from reaching behind the guard and becoming caught between the belt and pulley. In a conference call held with the parties prior to the hearing, respondent's representative stated that the respondent had decided to tender payment of the full civil penalty assessment levied by the petitioner for the violation in question, and petitioner's counsel agreed that the matter could be settled as provided for in Commission Rule 30, 29 C.F.R. § 2700.30. Since counsel also represented the petitioner in the other docketed cases scheduled for hearings, she was advised that she could make her settlement arguments orally on the record, and with the consent of counsel, respondent's representative was advised that he need not personally appear at the oral argument.

Petitioner's counsel asserted that after discussing the matter further with the respondent's counsel, and after due consideration of the requirements of section 110(i) of the Act she was of the view that the proposed settlement calling for the respondent to make full payment of the proposed penalty assessment was reasonable and in the public interest.

Inspector Joe McGregor, who was present in the hearing room, confirmed that the respondent operates a barite grinding milling operation which is under MSHA's enforcement jurisdiction. He confirmed that the plant in question employs approximately 20 miners, that its annual production is approximately 36,595 tons, and that the plant worked some 208,508 manhours during the period in question. Petitioner's counsel indicated that the plant has been inspected on 13 prior occasions by MSHA, and that during that time no citations were issued. Mr. McGregor confirmed that the cited conditions were promptly abated in good faith, and he concurred in the proposed settlement disposition of the case.

Conclusion

After careful consideration of the pleadings and the arguments presented in support of the proposed settlement disposition of this case, I conclude and find that the settlement is reasonable and in the public interest. I take particular note of the fact that respondent will pay the full amount of the proposed penalty, its excellent compliance record, the fact that it is a fairly small operation, and the fact that the condition was promptly abated. Accordingly, pursuant to 29 C.F.R. § 2700.30, the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $74 in satisfaction of the citation in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Chandra V. Fripp, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square Building, Suite 501, Dallas, TX 75202 (Certified Mail)

Mr. Edwin S. Ruth, Senior Safety Engineer, Environment, Health and Safety Section, 5950 North Course Drive, P.O. Box 22605, Houston, TX 77227 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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VENBLACK, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. EAJ 85-1
v.	:	
	:	Austin Black Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

DECISION

Appearances: J. Edgar Baily, Esq., George V. Gardner, Esq., Roanoke, Virginia, for Contestant; James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent; Mr. Bobby L. Lawson, Venblack, Inc., Raleigh Count West Virginia, Representative of Employees.

Before: Judge Lasher

This matter arises on the application of counsel for Contestant, VenBlack, Inc., for an award of attorney's fees and costs arising from their representation in a contest proceeding VenBlack, Inc., v. Secretary of Labor, WEVA 84-152-R, and a related penalty proceeding. Contestant cites Section 204(a) of the Equal Access to Justice Act, (EAJA), 28 U.S.C. § 2412, as authority for the relief requested and asserts that the Secretary's position "was not substantially justified." The Secretary opposes the application on the basis that its positio was substantially justified. Both parties have submitted a memorandum in support of their position.

Although the EAJA was repealed effective October 1, 1984, pursuant to a savings provision therein the application was not vitiated since the underlying contest/penalty proceedings were initiated before the date of repeal. It should be noted that there is no provision in the Mine Safety and Health Act of 1977 for an award of attorney fees except in discrimination cases.

The issue in the underlying proceedings was not whether th Contestant should be regulated by the Secretary of Labor but whether the Secretary should wear his OSHA hat or MSHA hat in doing so. The Contestant, the party which ultimately prevailed took the position that it should be regulated by OSHA, presumab a less severe regulating authority than the Mine Safety and Health Administration.

At the time the matter was in litigation, no judicial or Commission decision or authority was in existence which inevitably or predictably forecast an outcome in favor of Contestant, VenBlack. Indeed, the opposite was true. A considerable portion of the decision of the Administrative law judge (the undersigned) was spent in distinguishing the case of Donovan v. Carolina Stalite Company, 734 F.2d 1547 (D.C. Cir., 1984) which was unfavorable to the position of Contestant and lent strong support to the Secretary's. Carolina Stalite appeared to be the governing precedent throughout the trial stage and much of the post-hearing stage.

The contentions of the Secretary (listed at page 8 of the ALJ decision) were not unreasonable. Nor can it be said that the Secretary's action was inconsistent 1/ since MSHA had regulated Contestant's operation in the recent past albeit under different conditions.

Significantly, at the end of the ALJ decision, the following observation was made:

> This proceeding involves difficult issues and the positions of the parties both have some merit in the present stage of the development of the law on the subject.

In view of the foregoing, one is constrained to conclude that both at the time of the Secretary's initiation of MSHA's regulatory processes with regard to Contestant and at the time of the administrative litigation a reasonable basis in both law and fact existed which supported the Secretary's position. Substantial justification for the Secretary's action and position are thus found to have existed. The points and authorities set forth in the Secretary's memorandum in support of his answer to the application are found meritorious and by reference are incorporated herein as part of this decision. VenBlack, Inc's application is denied 2/ and this proceeding is dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

1/ There is no contention or indication that the Labor Department has acted oppressively or in bad faith in this matter.

2/ In view of this decision no ruling is made with respect to VenBlack's motion to withhold Confidential Financial Information from public disclosure and the same remains in a sealed envelope in the official case folder.

Distribution:

J. Edgar Baily, Esq., and George V. Gardner, Esq., 213 South Jefferson Street, Suite 900, Roanoke, VA 24011 (Certified Mail

James B. Crawford, Esq., Office of the Solicitor, U.S. Departme of Labor, 4015 Wilson Boulevard, Suite 400, Arlington, VA 222((Certified Mail)

Mr. Bobby L. Lawson, Representative of Employees, VenBlack, Inc Tams, Raleigh County, WV 25933 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 12 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 85-58
	:	A.O. No. 15-14633-03503
v.	:	Docket No. KENT 85-93
	:	A.O. No. 15-14633-03505
	:	Docket No. KENT 85-118
KAS COAL INC., Respondent	:	A.O. No. 15-14633-03506
	:	KAS No. 1

DECISION APPROVING SETTLEMENT

Appearances: Charles C. Kerz, Esq., U.S. Department of Labor, Nashville, TN, for Petitioner; Mr. Kenneth Graham, Louisville, KY, for Respondent

Before: Judge Maurer

These cases are before me upon petitions for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Subsequent to their opening statements at the hearing on August 7, 1985 at London, Kentucky, the parties jointly moved for approval of a settlement agreement and dismissal of the cases. The violations in these cases were originally assessed at a total of $809 and the Respondent has agreed to remit the full amount. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of a settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $809 within 30 days of this decision. Upon payment, these proceedings are DISMISSED.

Roy J. Maurer
Administrative Law Judge

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Mr. Kenneth P. Graham, 1220 Heyburn Building, Louisville,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 18 198

CHARLES J. ELLETT, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 85-34-D
v.	:	
	:	MSHA Case No. VINC CD 85-01
PEABODY COAL COMPANY, Respondent	:	Marissa Mine

ORDER OF DISMISSAL

Before: Judge Steffey

A prehearing order was issued in the above-entitled proceeding on February 5, 1985. Several extensions of time within which to reply to the prehearing order were thereafter granted because of complainant's poor health.

Counsel for complainant filed on September 16, 1985, a request that the proceeding be dismissed because the relief which he might obtain from a successful completion of this proceeding would be inadequate in view of the fact that complainant is unable to return to work because of his physical condition.

I find that good cause has been shown for granting the request to dismiss.

WHEREFORE, it is ordered:

The request to dismiss filed on September 16, 1985, is granted and the complaint filed in Docket No. LAKE 85-34-D is dismissed.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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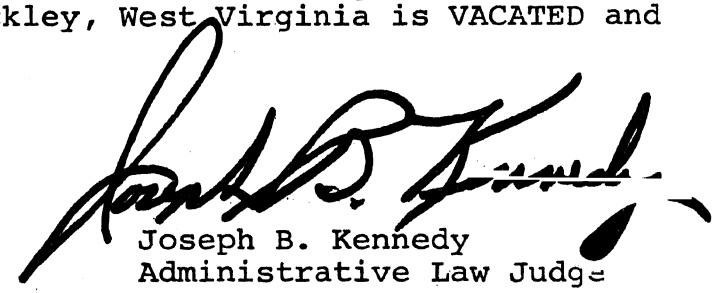
DOUGLAS COLEMAN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 85-140-D
BLUECO SALES AND PROCESSING COMPANY, Respondent	:	HOPE CD 85-4

ORDER OF DISMISSAL

Before: Judge Kennedy

For good cause shown, it is ORDERED that complainant's request to withdraw the captioned discrimination complaint be, and hereby is, GRANTED and the matter DISMISSED. It is FURTHER ORDERED that the notice of hearing for Wednesday, October 2, 1985, in Beckley, West Virginia is VACATED and the hearing CANCELED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-121-M A.C. No. 45-00365-05514
v.	:	Republic Unit
HECLA DAY MINES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

The parties have reached a settlement of the violation 1/ involved in the total sum of $225.00. MSHA's initial assessmer therefor was $300.00.

The Respondent is a medium-sized mine operator with a commendable history of prior violations insofar as safety-standard infractions are concerned. Respondent has abated the violative conditions in good faith and continues to reflect concern over this matter, according to the Secretary.

The Secretary's motion for approval also indicates that Respondent has acknowledged the problem" involved in the underlying discrimination matter; that there have been "no othe incidents similar in nature"; and that the Secretary has been assured by Respondent's management of its good faith in safeguarding against future occurrences.

In the premises, it appears that the settlement serves the best interests of mine safety and the same is approved.

ORDER

Respondent, if it has not previously done so, is ordered t pay $225.00 to the Secretary of Labor within 30 days from the date of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

1/ This penalty proceeding arises out of the Secretary's partially successful prosecution of a discrimination matter, WE 81-323-DM.

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF RICHARD N. TRUEX, Complainant,	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 85-151-D
	:	MSHA Case No. MORG CD 85-2
v.	:	McElroy Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Complainant;
Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Richard N. Truex, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." Mr. Truex alleges herein that he suffered a discriminatory loss of pay in violation of section 105(c)(1) of the Act[1] because of

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[1]Section 105(c)(1) of the Act provides in part that "[n]o person shall . . . discriminate against . . . or cause discrimination against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . in any . . . mine subject to this Act . . . because of the exercise of such miner . . . on behalf of himself or others of any statutory right afforded by this Act."

his participation as a representative of miners at a post-inspection conference under section 103(f) of the Act.[2] A motion to dismiss filed by the Consolidation Coal Company (Consol) on the grounds that the complaint had been untimely filed was denied by interlocutory decision dated May 17, 1985 (Appendix A).

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that Mr. Truex engaged in an activity protected by that section and that he suffered discrimination that was motivated in any part by the protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983), and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar those in the Pasula case.

The essential facts in this case are not in dispute. Richard Truex was, during relevant times, a member of the Union Local 1638 Safety Committee (under the United Mine Workers of America) chaired by Local President, Richard E. Lipinski. On August 27, 1984, an inspector for the Federal Mine Safety and Health Administration (MSHA), an authorized representative of the Secretary, telephoned Consol's Mine Safety Director, Tom Olzer, to inform him that he would be arriving at the mine at approximately 9:30 the next morning for what has been agreed was to be a section 103(f) post-inspection conference. Olzer later advised Truex of MSHA'S plans and, in turn, Truex told Lipinski. It is not disputed that Lipinski, on behalf of the union, then asked Truex to act as representative of miners at the conference.

At 7:50 the next morning Truex told Olzer that he would be the union representative for the conference. Olzer responded that since no inspector was then at the mine Truex would have to go to work with his regular crew on the 8:00 a.m. to 4:00 p.m. shift. Truex then asked if he could work

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[2]Section 103(f) of the Act provides in part that "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. . . ." That section also provides that "the representative of mines who is also an employee of the operator shall suffer no loss of pay

until the MSHA inspector arrived. Olzer responded that Consol's policy was to obtain miners' representatives from the area an inspector visits. Truex then asked if he could work in the "Bottom" so that he could be available for the inspection. Olzer refused.

It is not disputed that Truex at this point stated that he was on "union business" because he believed that he would otherwise have been unable to attend the post-inspection conference as the representative of miners. Olzer told him that if he was on "union business", he would not be permitted to perform any work that day.[3] It is not disputed that Truex performed no "union business" that day other than that related specifically to the section 103(f) post-inspection conference.

The MSHA inspector arrived around 9:20 a.m. and Truex accompanied him for the 1-1/2 hour conference. At the conclusion of the conference Truex asked to go to work for the remainder of the shift. Olzer refused the request. Consol has paid Truex at his regular rate of pay for only the 1-1/2 hour conference. Accordingly he seeks compensation in this case only for the remaining 6-1/2 hours of the shift he would have worked but for his assumption of "union business" and the related refusal of Consol to allow him to return to work.

Consol argues that under the National Bituminous Coal Wage Agreement of 1981 once Mr. Truex declared himself to be on "union business" he was no longer under its direction or control and that it therefore had no obligation to pay him for his subsequent activities. Consol further argues that it did not have to accept Mr. Truex as a representative of miners on the day in question but could have complied with section 103(f) of the Act by giving any one of the approximately 130 miners then working the opportunity to accompany the inspector during the conference at issue.

Section 103(f) of the Act provides, as relevent, that "a representative authorized by his miners shall be given an opportunity to accompany the . . . [inspector] . . . during the physical inspection of any coal . . . mine . . . for the purpose aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." [Emphasis added] Since it is not disputed in this case that the post-inspection conference which Mr. Truex attended was a

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[3]"Union business" is an unpaid leave of absence recognized in the applicable collective bargaining agreement, i.e., Article XVII section (1) of the National Bitimunimous Coal Wage Agreement of 1981.

conference within the meaning of section 103(f) of the Act it is clear from the above language that it is the miners and not the mine operator, who authorize or designate a representative for the purpose of participating in such a conference. There is no statutory ambiguity on this point and the plain meaning must prevail.

Consol nevertheless claims that the failure of Mr. Truex to have complied with the filing requirements under 30 C.F.R. Part 40 entitled it to deny him the right to participate as a representative under section 103(f). The same type of claim has, however, already been rejected by the Commission in a case brought by this same operator in Consolidation Coal Company v. Secretary and UMWA, 3 FMSHRC 617 (1981). That decision was not appealed by Consol. In the case at bar, just as in the cited case, Consol makes no claim that it lacked a basis for believing that the purported representative, Mr. Truex, was not in fact an authorized miner representative. For the reasons stated in the cited decision the claim at bar is also rejected.

Within this framework I find that Consol did in fact discriminate against Mr. Truex in denying him the statutory right to act as the "authorized" representative of miners under section 103(f) without in effect compelling him to first declare himself to be on "union business". Pasula, supra. Because Consol thereby so compelled Mr. Truex to go on "union business" he was denied the opportunity to return to his regular work shift upon the completion of his activities as the representative of miners. I find accordingly that Mr. Truex is entitled to damages under section 105(c)(1) including wages lost for the remainder of his work shift and interest.

DAMAGES

In accordance with the stipulations submitted in this case Richard Truex is entitled to back pay in the amount of $92.07 for the 6-1/2 hour period on August 28, 1984, during which he was unlawfully denied the opportunity to work and interest on that amount of $7.81.

CIVIL PENALTY

In light of the clear and unambiguous language of section 103(f) of the Act that the miners representative shall be "authorized by his miners" and not by the mine operator and the previous unsuccessful litigation on this issue brought by this same operator before this Commission I find that Tom Olzer in this case knew or should have known,

after he was informed that Mr. Truex was authorized to act as the representative of miners for the purposes of the subject conference, that he was violating section 105(c) of the Act when he denied him that opportunity without, in effect, requiring him to first assume a non-pay status on "union business". Since Mr. Olzer as Consol's Mine Safety Director, was an agent of the operator the violation was the result of operator negligence. Secretary v. Ace Drilling Company, 2 FMSHRC 790 (1980).

I find that the violation was also serious in that it could be expected to have had a chilling effect upon persons willing to act as representatives of miners thereby seriously diminishing the effectiveness of section 103(f) and indeed of enforcement under the Act in general. In assessing a penalty herein I have also considered that the mine operator is large in size and has a moderate history of violations. No evidence has been presented to indicate that Consol has violated section 105(c) within the previous 2 year period under facts similar to those herein. The violative condition has not been abated since Mr. Truex has not been paid for his lost wages. Under all the circumstances I find a penalty of $600 to be appropriate.

ORDER

Consolidation Coal Company is hereby ordered to pay Richard Truex the sum of $99.88 within 30 days of the date of this decision. Consolidation Coal Company is further ordered to pay to the Department of Labor a civil penalty of $600 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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Appendix A

May 17, 1985

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 85-148-D
ON BEHALF OF	:	MSHA Case No. MORG CD 84-16
BILLY DALE WISE, and	:	
LEO E. CONNER,	:	Docket No. WEVA 85-149-D
Complainants	:	MSHA Case No. MORG CD 84-19
v.	:	
	:	Ireland Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	DISCRIMINATION PROCEEDINGS
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 85-151-D
ADMININSTRATION (MSHA),	:	MSHA Case No. MORG CD 85-2
ON BEHALF OF	:	
RICHARD N. TRUEX,	:	McElroy Mine
Complainant	:	
v.	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION DENYING MOTION TO DISMISS

APPEARANCES: Covette Rooney, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Complainants; Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

These proceedings are before me upon Motions to Dismiss filed by the Consolidation Coal Company (Consol) in which it is alleged that the complaints in these cases were filed untimely with this Commission. Preliminary hearings were held in accordance with Rule 12(d) of the Federal Rules or Civil Procedure upon the request by Consol for disposition of the motions before trial on the merits. At hearing Consol

amended its motion to request summary decisions under Commission Rule 64. 29 C.F.R. § 2700.64. The facts underlying the issues before me are not in dispute.

DOCKET NO. WEVA 85-148-D

The individual Complainant in this case, Billy D. Wise, filed a timely complaint of discrimination with the Secretary of Labor on July 30, 1984, based upon his allegation of a discriminatory loss of pay on July 16, 1984. The Secretary did not however file his complaint with this Commission on behalf of Mr. Wise until March 26, 1985, nearly 8 months later. The Secretary informed Mr. Wise of that filing by letter dated April 24, 1985.

The Secretary acknowledges that he did not file the complaint in a timely manner but sets forth circumstances to explain that untimeliness. Counsel for the Secretary proffered without contradiction that the Philadelphia Regional Solicitor's Office (which represents the Secretary in this matter) did not receive the case file from the Mine Safety and Health Administration (MSHA) for its legal determination until September 28, 1984. Inasmuch as the case purportedly involved an issue of "first impression" the Regional Solicitor requested an opinion from the National Solicitor's Office on November 28, 1984. That opinion, to proceed with the case before this Commission, was issued on December 10, 1984 and was received by the Regional Solicitor's Office on December 20, 1984.

The designated trial attorney in the Regional Solicitor's Office thereafter, on December 26, 1984, forwarded the case file to the Office of Assessments within the Department of Labor for a civil penalty evaluation needed to comply with Commission Rule 42(b), 29 C.F.R. § 2700.42(b). The requested evaluation was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 15, 1985 and the complaint at bar was filed with this Commission on March 26, 1985. There was an admitted breakdown in procedures within the Department of Labor in failing to give written notice to Mr. Wise upon the Secretary's final determination (on December 10, 1984) that discrimination had occurred.

DOCKET NO. WEVA 85-149-D

The individual Complainant in this case, Leo E. Conner, filed a timely complaint of discrimination with the Secretary of Labor on August 16, 1984, based upon his allegation of a discriminatory loss of pay on July 19, 1984. The

Secretary did not file his complaint with this Commission on behalf of Mr. Conner until March 28, 1985, more than 7 months later. The Secretary informed Mr. Conner of that filing by letter dated April 24, 1985.

The Secretary again acknowledges that he did not file the complaint in a timely manner and sets forth similar circumstances to explain that untimeliness. Counsel for the Secretary proferred that the Philadelphia Solicitor's Office did not receive the case file from the MSHA for its legal determination until September 25, 1984. Since this also purportedly involved an issue of "first impression" the Regional Solicitor requested an opinion from the National Solicitor's Office on November 28, 1984. A response was obtained from that office on December 20, 1984 in which final authorization was received to proceed with the case before this Commission.

The designated trial attorney in the Philadelphia Solicitor's Office thereafter, on December 26, 1984, forwarded the case file to the Office of Assessments within the Department of Labor for a civil penalty evaluation needed to comply with Commission Rule 42(b). The file was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 15, 1985 and the complaint at bar was filed with this Commission on March 28, 1985. There was again an admitted breakdown in procedures within the Department of Labor in failing to notify Mr. Conner by letter upon the final determination by the Secretary's representative (on December 10, 1984) that discrimination had occurred.

DOCKET NO. WEVA 85-151-D

The individual Complainant in this case, Richard Truex, filed a timely complaint of discrimination with the Secretary of Labor on October 10, 1984, based upon his allegation of a discriminatory loss of pay on August 28, 1984. The Secretary did not however file his complaint on behalf of Mr. Truex with this Commission until April 2, 1985, nearly 6 months later. The Secretary informed Mr. Truex of that filing by letter dated April 11, 1985.

The Secretary again acknowledges that he did not file the complaint in a timely manner and sets forth similar circumstances to explain that untimeliness. Counsel for the Secretary proferred that the Philadelphia Solicitor's Office did not receive the case file from MSHA for its legal determination until December 20, 1984. That office decided on

January 8, 1985 to proceed with this case before this Commission and forwarded the case file to the Office of Assessments for a civil penalty evaluation needed to comply with Commission Rule 42(b). The file was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 18, 1985 and the complaint at bar was filed with this Commission on April 2, 1985. There was again an admitted breakdown in procedures within the Department of Labor in failing to notify Mr. Truex by letter upon the final determination by the Secretary (on January 8, 1985) that discrimination had occurred.

Analysis

Consol argues that the Secretary's delays in filing these complaints with this Commission violates the provisions of section 105(c) of the Act. Section 105(c)(3) provides in part that "within 90 days of the receipt of a complaint filed [under section 105(c)(2)] the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred." Section 105(c)(2) provides that upon the Secretary's determination that section 105(c) has been violated "he shall immediately file a complaint with the Commission, with service upon the alleged violator, and the miner, applicant for employment, or representative of miners alleging such discrimination [emphasis added]." Consol also alleges that these filing delays were in violation of Commission Rule 41(a), 29 C.F.R. § 2700.41(a), which requires that a complaint of discrimination "shall be filed by the Secretary within 30 days after his written determination that a violation has occurred." Consol concedes that it did not suffer any legal prejudice as a result of the cited delays but nevertheless asserts that the cases should be dismissed for untimely filing.

The Secretary admits the filing delays but suggests that these delays were attributable to the heavy caseload in his office and a manpower shortage. He also claims that some of the delays were attributable to the procedures now required by amended Commission Rule 42, 29 C.F.R. §2700.42. Commission Rule 42 as amended on February 2, 1984 requires the Secretary to include in his complaint filed with the Commission a specific proposed civil penalty and the reasons in support thereof. The Secretary represents that he is now studying various methods for shortening his procedures for proposing civil penalties in discrimination cases. The Secretary argues that for the above reasons the delays in these cases were excusable.

The Secretary further argues that his tardiness should be excused because dismissal of these cases would only hurt the individual complainants he represents -- contrary to the congressional intent. The legislative history relevant to section 105(c) reads as follows:

> "The Secretary must initiate his investigation within 15 days of receipt of the complaint, and immediately file a complaint with the Commission, if he determines that a violation has occurred. The Secretary is also required under [section 105(c)(3)] to notify the complainant within 90 days whether a violation has occurred. It should be emphasized, however, that these time frames are not intended to be jurisdictional. The failure to meet any of them should not result in a dismissal of the discrimination proceeding; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations."

S. Rep. No. 181, 95th Cong., 1st Session 36 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News, at 3436.

Within this framework I am compelled to find that the Secretary's delays in filing these complaints do not warrant dismissal of these cases. I do not find any evidence that the delays were caused by bad faith and it appears that the Secretary's tardiness was caused in part by his limited staff and heavy caseload. In addition it would be totally inappropriate to prejudice the individual complainants in these cases (who have not caused the delays) because of the Secretary's tardiness. Finally, since Consol concedes herein that it did not suffer any legal prejudice by the delays those delays are accordingly harmless.[1] Under the circumstances the motions to dismiss (and/or motions for summary decision) are denied.

Gary Melick
Administrative Law Judge

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[1]No request has been made for sanctions solely against the Secretary for his acknowledged tardiness. However consideration could be given in any civil penalty assessment for any additional costs to Consol attributable to the delays.

Distribution:

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rbg

September 23, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 85-22-M
	:	A. C. No. 23-00712-05501
v.	:	
	:	Docket No. CENT 85-23-M
MISSOURI GRAVEL CO. Respondent	:	A. C. No. 23-00712-05502
	:	LaGrange Plant No. 3
	:	
	:	Docket No. CENT 85-30-M
	:	A. C. No. 23-00712-05503
	:	
	:	LaGrange Plant No. 1

DECISION APPROVING PENALTIES

Before: Judge Merlin

On June 26, 1985, I ordered the Solicitor to furnish information sufficient to justify the assessment of the proposed penalties for the twenty-nine violations involved in these matters. The operator has paid the proposed penalties totallin $1,638. The Solicitor recognizes that this payment is not determinative of how these cases should be treated. However, because the operator did not answer, the Solicitor argues that show cause order should be issued. The Solicitor recognizes th the operator who has paid, will not respond to the show cause order. Therefore, the Solicitor expects the operator to be hel in default, relieving the Solicitor of the responsibility to justify the proposed penalties in a settlement motion.

I am well aware of the Commission's procedural regulations regarding show cause and default orders. However, I believe th once a penalty petition is filed, the Commission's jurisdiction attaches and it has the authority and responsibility to approve proposed penalties. Indeed, the Solicitor's own letter dated May 22, 1985, specifically states that he presumes payment of t penalties by the operator must be approved by the Commission. The Commission could not do this if it were to follow the Solic tor's proposed charade of meaningless show cause and summary default orders. Settlement motions have been filed by Solicito in numerous cases where the operator paid the assessments befor an answer. The Solicitor's motion to reconsider is therefore DENIED.

Since however these penalty petitions were filed several months ago, I do not believe their dispostion should be further delayed. In this instance, therefore, I have reviewed all the citations and pursuant to this review, have determined that the proposed penalties are appropriate under the Act and therefore approve them. The Solicitor should not view this as a precedent for not filing the required motions.

The operator having paid, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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Mr. John R. Fierke, Vice President, Missouri Gravel Co., R. R. 1 Hannibal, MO 63401 (Certified Mail)

/gl

FALLS CHURCH, VIRGINIA 22041

SEP 23 1985

RAE JEWELL BEAVER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 85-100-D
	:	MSHA Case No. HOPE 84-17
CEDAR COAL COMPANY, Respondent	:	Surface Mine

ORDER OF DISMISSAL

Appearances: Paul K. Reese, Esq., UMWA, Charleston, West Virginia, for Complainant;
Joseph M. Price, Esq., Robinson & McElwee, Charleston, West Virginia, for Respondent

Before: Judge Melick

Complainant requests approval to withdraw her Complaint in the captioned case upon the following agreement between the parties hereto:

(1) That Cedar Coal Company policy provide that any employee may, upon reasonable advance notice, review his/her personnel file.

(2) That any job references relative to Rae Jewell Beaver will be neutral, and any reference to the incident involved in this complaint will be expunged from complainant's file.

(3) That Cedar Coal Company will provide drillers with either transportation or communication sufficient to meet all applicable safety and health statutes and regulations.

Under the circumstances herein, permission to withdraw the Complaint is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed.

Gary Melick
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 84-184
	:	A. C. No. 15-13881-03528
v.	:	Docket No. KENT 84-196
	:	A. C. No. 15-13881-03530
PYRO MINING COMPANY, Respondent	:	Docket No. KENT 84-238
	:	A. C. No. 15-13881-03532
	:	Pyro No. 9 Slope Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
William Craft, Manager of Safety, Pyro Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Steffey

Completion of the Record

A hearing in the above-entitled proceeding was held on February 12, 1985, in Evansville, Indiana, under section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977, pursuant to a notice of hearing issued January 15, 1985. An unusually heavy snowstorm occurred during the afternoon and night preceding the hearing so that respondent's witnesses were unable to be present at the hearing and it was very doubtful if the roads would be clear enough for them to be present to testify on the day following the hearing. Therefore, I agreed that the parties could subsequently obtain a deposition of any witness who was unable to appear at the hearing and it was agreed that the deposition would be used as a supplement to the record for the purpose of making findings of fact and deciding the issues in this proceeding (Tr. 190).

The deposition referred to in the preceding paragraph was taken on May 23, 1985, and the typed deposition was received by me on July 25, 1985. The parties submitted only one exhibit in conjunction with the deposition and it was marked as Exhibit C. The parties inadvertently overlooked the fact that I had received in evidence at the hearing Respondent's Exhibits A through F. Consequently, there is

already in evidence as Exhibit C a one-page document consisting of page No. 254 from MSHA's inspection manual. There are frequent references to the duplicate Exhibit C in the parties' deposition. If I were to redesignate Exhibit C accompanying the deposition as Exhibit G so as to eliminate the duplicate marking of two different exhibits with the letter "C", the many references in the deposition to Exhibit C would also have to be changed. On the other hand, page 254 of the inspector's manual, which was designated as Exhibit C at the hearing, is referred to in the transcript of the hearing only in the index of exhibits and on page 80 of the transcript. Therefore, the simplest way to eliminate the repetitious use of the letter "C" for identifying two exhibits is to redesignate page 254 from the inspection manual as Exhibit G and correct the index and page 80 of the transcript to show that page 254 of the inspector's manual is Exhibit G and to receive in evidence as Exhibit C the drawing which was submitted with the parties' deposition.

For the reasons given above, the excerpt from MSHA's inspection manual having at the bottom of that excerpt a Roman numeral "II" and the number "254" is redesignated as Exhibit G and is received in evidence as Exhibit G. The necessary changes will physically be made on the exhibit and on the index to the transcript of the hearing. Page 80 of the transcript will also be corrected to show the marking and receipt in evidence of Exhibit G on that page instead of Exhibit C.

The drawing of the No. 4 Unit of Pyro's No. 9 Slope Mine, prepared by Pyro's witness Tom Hughes, is received in evidence as Exhibit C and the parties' deposition of May 23, 1985, will be considered as additional transcript of the witnesses who testified in this proceeding.

References to the transcript of the hearing will be shown as "Tr. ___" in this decision and references to the deposition will be shown as "Dep. ___".

Issues

The issues in a civil penalty proceeding are whether violations of the mandatory health and safety standards occurred and, if so, what civil penalties should be assessed based on the six criteria listed in section 110(i) of the Act. Counsel for the Secretary filed his posthearing brief on August 26, 1985, and Pyro's representative filed his posthearing brief on August 28, 1985. The arguments made by the parties are hereinafter considered.

CONSIDERATION OF PARTIES' ARGUMENTS

DOCKET NO. KENT 84-184

The proposal for assesment of civil penalty filed in Docket No. KENT 84-184 seeks to have penalties assessed for alleged violations of section 75.400 and section 75.503. Both violations were alleged in citations written under section 104(a) 1/ of the Act in conjunction with an order of withdrawal issued under section 107(a) 2/ of the Act.

Findings of Fact

1. Imminent-danger Order No. 2338837 was written after the inspector had obtained a reading on his methane detector indicating the presence of 2.3 percent methane at the working face of the No. 2 entry (Tr. 34; Exh. 2). The inspector issued Citation No. 2338839 alleging a violation of section 75.503 3/ because a cable had been ripped out of a splice

1/ Section 104(a) provides in pertinent part:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. * * *

2/ Section 107(a) provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

3/ Section 75.503 provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

box on a loading machine which was sitting close to the face where the high reading of methane had been obtained. The loading machine also had an opening in excess of .004 of an inch between the cover and the frame of the forward/reverse electrical compartment (Tr. 38; Exh. 4). The inspector issued Citation No. 2338840 alleging a violation of section 75.400 4/ because loose coal had been allowed to accumulate along the ribs of the Nos. 5, 6, and 7 entries up to 1 foot in depth and in several room necks (Tr. 19; 104; Exh. 5). The inspector prepared Exhibit 6 to show where the coal existed. The coal is depicted by small dots which appear on Exhibit 6 in two room necks on the right side of No. 7 entry and in one room neck on the left side of No. 1 entry (Tr. 17). The room necks were from 8 to 10 feet deep and 20 feet wide and were filled with loose coal. Loose coal had also been allowed to accumulate in large quantities in the crosscut between Nos. 6 and 7 entries and in the No. 7 entry just inby Spad No. 1523 as shown on Exhibit 6 (Tr. 18; 22).

2. The inspector wrote the words "stored coal" on the right side of Exhibit 6. He stated that he made that entry on the exhibit because Pyro's safety manager, Tom Hughes, who accompanied him on his inspection, stated that Pyro had permission to store the coal along the ribs and in room necks during the first two shifts and then the stored coal was taken out of the mine on the third shift. The reason given by Hughes for storing the coal was that Pyro had a raw-coal contract at that time which required Pyro to deliver the purest coal which could be picked up by the loader. After the loader had picked up all the coal it could while trying to avoid getting into draw rock or fire clay, a scoop followed and scraped up coal containing draw rock and fire clay and stored it along the ribs and in room necks (Tr. 16; 24; 52; 56; 89). The conveyor belt was removed from the regular stock pile when the stored material containing rocks and fire clay was being transported out of the mine (Dep. 28).

3. Although Hughes told the inspector that the stored coal cited by the inspector as coal accumulations was 90 percent rock, the inspector stated that it appeared to be 90 percent coal to him (Tr. 21; 56-57). The inspector collected two samples of the stored coal and the laboratory analyses of those samples indicated that they were 22 and 20 percent incombustible, respectively, whereas section 75.403 requires

4/ Section 75.400 provides "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric

intake entries like those in which the samples were taken, to be rockdusted so as to have an incombustible content of 65 percent (Tr. 64; 96; Exh. 9). The inspector, however, made no attempt to take a sample which would contain rocks and the inspector agreed that he took the dust sample in the usual manner which involved passing the coal dust through a sieve which would not have permitted rocks to pass through the sieve into the coal collected for the purpose of making a laboratory analysis (Tr. 91; 104-105). The inspector insisted that the stored material contained entirely too much coal to be treated as rocks (Tr. 92). Hughes testified that the stored material was processed in Pyro's preparation plant and that the resulting coal was sold (Dep. 29-30).

4. As indicated above, the loose coal accumulations were among the hazards which the inspector took into consideration when he issued imminent-danger Order No. 2338837 at the time he obtained a methane reading of 2.3 percent at the face of the No. 2 entry. The other hazard which the inspector took into consideration was the aforementioned violation of section 75.503 alleged in Citation No. 2338839 because the missing cable and light on the right side of the loading machine and the opening of more than .004 of an inch in the control panel supplied an ignition source for the methane accumulation which the inspector believed was approaching the explosive range of 5 percent (Tr. 39; 47; 60; 100-101).

Citation No. 2338839 3/23/84 § 75.503 (Exhibit 4)

The violation of section 75.503 alleged in Citation No. 2338839 was that the loading machine had an opening in excess of .004 of an inch between the cover and the frame of the forward/reverse electrical compartment and there was no conduit and cable to one light and a splice box (Finding No. 1 above). Pyro's brief does not deny that those openings existed and the loading machine operator testified that he was aware that the light was not burning but that he did not know why it failed to work (Tr. 126). Pyro's brief (pp. 6 and 7) mixes its discussion of Citation No. 2338838, alleging a violation of section 75.503, with its discussion of Citation No. 2338839, alleging a violation of section 75.308. Most of that discussion pertains to the violation of section 75.308 which is hereinafter evaluated under Docket No. KENT 84-196. A portion of Pyro's defense to the violation of section 75.503 is intertwined with its argument that the loading machine involved was not situated in a "working place" which is defined in section 75.2(g)(2) as "the area of a coal mine inby the last open crosscut." Section 75.503 is quoted in full in footnote 3 on page 3 above and that section requires equipment to be permissible "which is taken into or used inby the last open crosscut".

The Commission long ago considered and rejected the argument that a violation of section 75.503 may not be cited unless the equipment involved is located inby the last open crosscut. In Solar Fuel Co., 3 FMSHRC 1384 (1981), the Commission held that all MSHA has to prove with respect to showing that a violation of section 75.503 occurred is that there is an intent to take equipment inby the last open crosscut. The Commission stated that the emphasis is not on where the equipment is located at the time of the inspection, but whether the equipment will be taken inby the last open crosscut. The Commission pointed out that the purpose of the permissibility standard is to assure that equipment will not cause a mine explosion or fire. Therefore, the Commission stated that section 75.503 applies not only to equipment which has been taken inby the last open crosscut at the time it is inspected, but also to equipment which is intended to be or is habitually taken or used inby the last open crosscut, even if the inspection actually occurs when the cited equipment is outby the last open crosscut.

In this instance, the loading-machine operator testified that he had just loaded at least one shuttle car of coal at a point which was 15 feet from the working face and had backed up in position to load another shuttle car when the inspector found the permissibility violation of section 75.503 (Tr. 128-129). There can be no doubt but that the loading machine cited by the inspector was intended to be used inby the last open crosscut and that it was properly cited by the inspector for a violation of section 75.503. Therefore, I find that a violation of section 75.503 occurred. Pyro's brief (p. 2) also makes some arguments about the nonserious nature of the violation. Those arguments will subsequently be considered when I discuss the criterion of gravity in assessing a civil penalty.

Citation No. 2338840 3/23/84 § 75.400 (Exhibit 5)

Citation No. 2338840 alleged a violation of section 75.400 because loose coal had been allowed to accumulate along the ribs of Nos. 5, 6, and 7 entries up to 1 foot in depth and in several room necks in piles 20 feet wide and 3 feet in depth (Finding No. 1 above). Pyro's brief (pp. 5 and 7) objects to the alleged violation of section 75.400 for three reasons. First, Pyro claims that the samples of the loose coal taken by the inspector were not representative. Second, Pyro argues that the inspector failed to take a band sample. Third, Pyro contends that the No. 4 Unit, where the accumulations were found, was in the Second Main North area of the mine rather than in the Main West area of the mine where the inspector understood the No. 4 Unit to be located.

In considering Pyro's objections to the violation of section 75.400 based on the claim that the inspector's dust sample was not representative of the type of materials he found, it should be noted that the former Board of Mine Operations Appeals held in Kaiser Steel Corp., 3 IBMA 489 (1974), that an inspector does not need to take a dust sample in order to prove a violation of section 75.400. I am aware of no Commission decision which has reversed the former Board's holding. Since Pyro does not deny that the accumulations existed, I could find that the violation occurred on that basis alone and consider Pyro's arguments solely from the standpoint of gravity in assessing a civil penalty. I shall, however, consider Pyro's arguments about the validity of the representative samples because section 75.400 refers to coal dust, float coal dust, loose coal and "other combustible materials" so that an operator can hardly be said to have violated section 75.400 if the accumulations of loose coal described in an inspector's citation are so predominately made up of draw rock and fire clay as to render those materials incombustible as claimed on pages 7 and 8 of Pyro's brief.

The inspector agreed that the two samples he took of the cited materials were almost entirely pure coal because the rocks in the accumulations would not pass through the sieve he used to collect the samples which he sent to the laboratory for analysis. The inspector also agreed that if he had been able to include rock in the samples, the rock would have resulted in a greater incombustible content than the results of the analysis showed, which was in a range of from 20 to 22 percent incombustible (Tr. 105), but the inspector insisted that the materials he had cited as loose coal accumulations consisted of too much coal to be treated as if they were almost entirely made up of rocks (Tr. 92). Since both samples were obtained in intake entries, the incombustible content would have had to be at least 65 percent incombustible in order to be exempt from being cited as combustible accumulations (Tr. 96). While the inspector did not take a sample from the No. 1 entry, he observed loose coal in a room neck in the No. 1 entry which is a return entry where the incombustible content is required to be 80 percent (Tr. 96; Exh. 6; Dep. 24).

Pyro's claim that the accumulated materials described in the inspector's citation were composed of too much rock and fire clay to be considered combustible is not supported by the testimony of either of Pyro's witnesses. It is undisputed that the material which was piled along the ribs of the Nos. 5, 6, and 7 entries and in the room necks shown on Exhibit 6 were the materials which were scraped up by the scoop after the loading machine had removed the choice

through Pyro's processing plant. The inaccuracy of Pyro's contention that the accumulations stored along the entries and in room necks were incombustible is demonstrated beyond any doubt by the following testimony of the loading-machine operator (Tr. 150-151):

> A Well, Pyro was wanting us to load ash-free coal, the best we can. In order to do that, is to keep my loader head from getting down in that soft fireclay and, you know, scooping it up.
>
> And that's what they mean by trying to keep my head up--try to stay, you know, just above it and not get as much--get as least amount of fireclay as you can get by with.
>
> Q So, really, what you're telling me is that you don't go back and drop it any lower than that.
>
> A I--well, I try to keep it to grade, more or less, is what I always try to do.
>
> Q But that coal is taken on out and sold.
>
> A Right.
>
> Q And so no product that's picked up by the loading machine is stockpiled?
>
> A No.
>
> Q The stockpiling is done solely with the scoop.
>
> A Right.
>
> Q Which deliberately picks up the fireclay and coal.
>
> A Well, even the scoop--they don't want the scoops to get the fireclay either, if they can prevent it, but it's just hard not to.

The testimony of Pyro's safety manager also shows that the coal cited by the inspector as combustible accumulations were not primarily composed of rocks and fire clay (Dep. 29)

> Q But the material that you stored in the room neck that Mr. Dupree [the inspector] found, you did have to put through a process to separate

Q And were you then able to use that same coal in your raw coal contract or did you do something else with that coal?

A No. That coal could then be marketed.

The above testimony of Pyro's witnesses support a finding that, while the inspector's samples may not have been representative of all of the materials which he found along the ribs and in the room necks, those materials were also composed primarily of coal because they had been gathered by a scoop operator who had been instructed to gather up as little fire clay and rocks as possible. If the coal had been as incombustible and full of rocks as Pyro argues it was in its brief, it would not have been economical to run the coal through the processing plant.

The Commission's very recent decision in Black Diamond Coal Mining Co., 7 FMSHRC ____, August 5, 1985, rejected an argument almost identical to the one made by Pyro in this proceeding. In the Black Diamond case, the operator's foreman testified that coal accumulations cited by the inspector were 80 percent rock and the remaining 20 percent was coal. The foreman also testified that the accumulations were so wet that when he grabbed a handful of it and squeezed it, the material ran through his fingers. The Commission rejected Black Diamond's argument that the accumulations were not combustible by stating, among other things, as follows (p. 5):

> Even if, as Black Diamond asserts, the accumulation was damp or wet, it was still combustible. For example, in the case of a fire starting elsewhere in a mine, the heat may be so intense that wet coal can dry out, ignite and propagate the fire. Furthermore, even absent a fire, accumulations of damp or wet coal, if not cleaned up, can eventually dry out and ignite. Also, coal mixed with rock and fire clay can nevertheless burn. A construction of the standard that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist. [Emphasis supplied.]

Since the record in this proceeding shows that the accumulations cited by the inspector were primarily coal which had been collected by a scoop operator who had been instructed to pick up as little fire clay as possible, and since the

Commission has already rejected a claim that accumulations composed of large amounts of rock and fire clay should not be cited under section 75.400 as combustible materials, I find that the violation of section 75.400 alleged in Citation No. 2338840 occurred.

Pyro's claim that the inspector's sample should have been made up of materials taken from the mine floor, ribs, and roof is also rejected because a band sample is required to be taken only when the inspector is citing a violation of section 75.403 because of an operator's failure to apply rock dust "upon the top, floor, and sides of all underground areas of a coal mine". As I observed at the commencement of this discussion of the violation of section 75.400 here involved, the former Board held long ago in the Kaiser Steel case that an inspector is not obligated to take a sample to prove a violation of section 75.400. Therefore, Pyro's objection to the sample as not having been a band sample is rejected as being an irrelevant consideration in the proving of a violation of section 75.400.

The final objection made in Pyro's brief (p. 5) to the inspector's having cited it for a violation of section 75.400 is that the laboratory report showing the results of analysis of the dust samples indicates that the inspector obtained the samples in the No. 4 Unit in the Main West area of the mine, whereas the No. 4 Unit is located in "Second Main North" (Tr. 66; Exh. F). Pyro states that the inspector claims that Pyro's safety manager told him that the No. 4 Unit was located in Main West and that the safety manager denies that allegation (Dep. 20). On cross-examination, however, the safety manager testified that he took the inspector to the No. 4 Unit and that the inspector found the conditions described in his citations at the place where the safety manager took him (Dep. 34).

The operator of the loading machine testified that he works in the No. 4 Unit where the accumulations were found and that the No. 4 Unit is 2 miles from the bottom so that it takes 45 minutes for him to go to the No. 4 Unit and 45 minutes for him to get back from the No. 4 Unit (Tr. 155-156). I conclude that the No. 4 Unit was located in Second Main North, but it is immaterial, in proving that a violation of section 75.400 occurred, whether the No. 4 Unit is in Main West or Second Main North because the accumulations existed in a place where Pyro was producing coal and at a place which was 2 miles from the bottom where the miners entered the mine to go to work. An explosion or fire occurring in a place that far underground would present problems in containment and rescue and make it especially important that the inspector take prompt action in preventing

the No. 4 Unit was in Second Main North instead of Main West as indicated by the inspector when he submitted his dust samples for analysis.

Assessment of Penalties

Payment of Penalties Will Not Cause Pyro To Discontinue in Business

Pyro stipulated in its answer to the prehearing orders issued in this proceeding that it is subject to the Act. It also dealt with one of the assessment criteria by stipulating that the payment of civil penalties will not cause it to discontinue in business.

The Size of Pyro's Business

The proposed assessment sheets in the official files in Docket Nos. KENT 84-184 and KENT 84-196 show that Pyro produces over 1,655,000 tons of coal at its No. 9 Slope William Station and over 3,000,000 tons of coal on a company-wide basis. Those production figures support a finding that Pyro is a large operator so that penalties in an upper range of magnitude are warranted under the criterion of the size of the operator's business.

Good-Faith Effort To Achieve Rapid Compliance

The inspector testified that Pyro assigned all of its miners to abating the various violations he had cited so that Pyro corrected all of the hazardous conditions, including cleaning up all the loose coal, within a very short time so that he was able to terminate the citations and order of withdrawal in about 2 hours after they were written (Tr. 45; Exhs. 4 and 5). It is my practice to increase a civil penalty otherwise assessable under the other criteria if I find that an operator has failed to make a good-faith effort to achieve rapid compliance and to decrease the penalty otherwise assignable under the other criteria only if the operator shows an unusual effort to achieve rapid compliance. In view of the extensive amount of loose coal which had to be cleaned up, along with correcting the permissibility violations on the loading machine and other hazards which are not a part of the contested aspects of this case, I find that Pyro made a greater than normal effort to achieve rapid compliance in this instance and that the civil penalties assessed for the violations which occurred on March 23, 1984, should be reduced by 20 percent.

History of Previous Violations

Exhibit 1 is a computer printout listing the violations of the mandatory health and safety standards for which Pyro has been cited between the dates of December 1, 1982, and March 22, 1984. Exhibit 1 shows that Pyro has been cited for 38 previous violations of section 75.400 from February 8, 1983, to and including February 22, 1984. All of the violations were cited under section 104(a) of the Act and the inspectors did not consider 22 of them to be significant and substantial. 5/ Five of the previous violations occurred in February, which was the month preceding the violation here involved, and all five of those violations were considered to be significant and substantial. S. REP. NO. 95-181, 95th Cong., 1st Sess. 43 (1977), made the following comment about using the criterion of history of previous violations in assessing penalties:

> In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation. 6/

Exhibit 1 further shows that Pyro paid penalties for nine previous violations of section 75.400 in January and February of 1984 which were the 2 months preceding the month in which the violation of section 75.400 alleged in Citation No. 2338840 occurred. Consequently, Pyro's history of previous violations of section 75.400 is worse than the seven or eight referred to in the legislative history. Exhibit 1 indicates that MSHA proposed penalties ranging from $20 to $178 for the nine previous violations. Of course, the penalties proposed by MSHA are total penalties based on an evaluation of all of the six criteria. I believe that Congress

5/ In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commission held that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

6/ Reprinted in LESISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 631 (1978).

intended for the criterion of history of previous violations to result in a penalty "several times greater" than the amount assessed under that criterion for the first violation. MSHA's proposed penalties for violations cited under section 104(a) are generally proposed under the penalty formula described in 30 C.F.R. § 100.3 and that rarely results in assessment of more than $50 under the criterion of history of previous violations. When one considers that Pyro was assessed penalties for 38 violations of section 75.400 at just one mine over a period of 16 months and that nine of those violations occurred just 2 months before the violation of section 75.400 here involved, I believe that a substantial penalty should be assessed under the criterion of history of previous violations.

Pyro's brief (p. 8) tries to minimize its excessive violations of section 75.400 by arguing that the penalties were cited during 500 inspection days so that the "violation density for this mine during this period was well below the National average". MSHA's penalty formula for history of previous violations in section 100.3(c) relies upon a ratio of total violations to the number of inspection days, but the Commission has ruled in many decisions that when cases are heard on a record before one of the judges, that the judge should assess penalties by application of the six criteria to the evidence before him, irrespective of the amount of the penalties proposed by the Secretary. Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd, 736 F.2d 1147 (7th Cir. 1984), and U.S. Steel Mining Co., 6 FMSHRC 1148 (1984). I believe that MSHA's formula for proposing a penalty under the criterion of history of previous violations fails to take into consideration an operator's repeated violations of the same safety standard, especially if that standard, by its very nature, exposes the miners to possible fires and explosions, as is the case when an operator violates section 75.400. Civil penalties were placed in the Act as a means to deter operators from departing from safe practices. The criterion of history of previous violations is a criterion which especially takes into consideration the question of an operator's efforts to avoid repeated violations of the same standard. In view of Pyro's very unfavorable history of previous violations, I find that a penalty of $200 should be assessed under the criterion of history of previous violations for the violation of section 75.400.

Exhibit 1 shows occurrence of 12 previous violations of section 75.503 from August 9, 1983, to and including March 22, 1984. Four of the 12 violations occurred during the months of January, February, and March 1984. Consequently, Pyro's history of previous violations of section 75.503 is considerably more favorable than its history of

previous violations of section 75.400. There is, however, still an excessive number of previous violations of section 75.503 and I find that that history warrants assessment of a penalty of $75 under the criterion of history of previous violations for the violation of section 75.503 alleged in Citation No. 2338839.

Gravity

As I noted at the commencement of my discussion of the violations involved in Docket No. KENT 84-184, both violations were issued by the inspector as part of imminent-danger Order No. 2338837 which was primarily based on the fact that the inspector had detected 2.3 percent of methane near the working face in the No. 2 entry where the loading machine had just finished loading a shuttle car with coal before the inspector made his methane reading (Finding Nos. 1 and 4 above). The primary reason for the inspector's issuance of the imminent-danger order was that the inspector feared that an explosion could have occurred at any time if the methane concentration should continue to increase. The inspector testified that he considered the violation of section 75.503 to be very hazardous because the lack of a cable on the loading machine left an opening "right straight into the compartment, plus the openings in the panels, this forward/reverse compartment is just always arcing and sparking, and it was--you know, it wasn't in permissible condition" (Tr. 47).

Pyro's brief (p. 2) seeks to minimize the hazardous nature of the violation of section 75.503 by including as a part of its brief some Bureau of Mine statistics for the years 1971 through 1976. From those statistics, Pyro points out that only 17 out of 298 methane ignitions, or 5.7 percent, were caused by electrical arcs of all kinds, including trolley wires, trolley feeder wires, trailing cables, etc. Pyro also claims that the specific gravity of methane emanating from the coal seam in its mine has a specific gravity which would cause the methane to be 30 inches above the loading machine so long as it was found in a concentration of 3 percent or less. Moreover, the writer of Pyro's brief states on page 2 that he has never known a loading machine to cause a methane ignition. 7/

7/ Pyro's representative in this proceeding is not a lawyer, but he has participated in numerous hearings before the Commission's judges. He should be reminded that the purpose of a hearing is to allow the parties to present evidence which can be the subject of cross-examination or presentation of

Even if Pyro is correct in alleging that only 17 out of 298 methane ignitions between 1971 and 1976 were caused by electrical arcs, Pyro's statistics show that those 17 ignitions caused five injuries and 22 deaths. Moreover, even if no loading machine has ever caused a methane ignition up to the present time, that is no reason to assume that the ignition hazards observed by the inspector on the loading machine involved in this case could not have become the first ignition caused by a loading machine if the inspector had not ordered all power to be cut off and had not required action to be taken to reduce the methane concentration to a legal and safe amount.

As for Pyro's claim that the methane here involved would have remained above the location of the ignition hazards observed by the inspector on the loading machine, the loading machine's operator testified that he thought the methane concentration was caused by "these digging arms on the loader" stirring the coal around and they "pushed gas out of the coal" (Tr. 137). If, as the loading-machine operator speculated, the methane came out of the coal on the mine floor which the machine was loading, the methane, being lighter than air, would necessarily have had to come in close proximity to the ignition hazards cited by the inspector on its way to the roof of the mine where Pyro claims it would harmlessly have remained.

The above discussion shows that the violation of section 75.503 was extremely serious because it constituted a potential ignition hazard which could, as the inspector testified (Tr. 47), have caused a mine explosion or fire. Therefore, I find that a penalty of $2,000 should be assessed under the criterion of gravity.

Fn. 7/ continued
rebuttal evidence by the opposing party. It is especially objectionable for him to testify in his brief as to facts which the Secretary's counsel is precluded from the right of cross-examination and concerning which the judge has no way to seek clarification. I could, of course, strike the portions of Pyro's brief which are based on facts and exhibits which were not introduced or even discussed at the hearing. I am not doing so because they are not sufficiently meritorious, when considered, to affect the outcome of this case. After I had drafted this portion of the decision, the Secretary's counsel filed on September 3, 1985, a motion to strike the materials discussed above. The motion to strike is hereinafter denied for the reason stated above.

true, as Pyro argues in its brief (p. 5), that the coal accumulations were 300 feet from the loading machine where the methane and ignition source were observed, the inspector stated that the loose coal and coal dust accumulations contributed to the seriousness of having an excessive quantity of methane in the mine. The inspector testified that there was coal dust with the loose coal and that if there is an ignition which picks up the coal dust and places it in suspension, there is a likelihood of a propagation which "can just rip the mine open" (Tr. 48-49). Also the loose coal in the room neck in the No. 1 entry was much closer to the source of the ignition hazard in the No. 2 entry than the loose coal accumulations cited in the Nos. 5, 6, and 7 entries (Exh. 6).

The preponderance of the evidence supports a finding that the loose coal accumulations constituted a serious hazard in the circumstances described by the inspector. The danger associated with the loose coal, however, was not as great as the ignition hazard caused by the violation of section 75.503 discussed above. Therefore, I find that a penalty of $750 should be assessed under the criterion of gravity for the violation of section 75.400 alleged in Citation No. 2338839.

Negligence

The final assessment criterion to be considered is negligence. The operator of the loading machine testified that he knew the light on the loading machine was not working before the inspector found that the cable which supplies power to the light had been cut off (Tr. 126). While it is true, as noted in Pyro's brief (p. 6), that the Commission held in Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), that negligence of a rank and file miner should not be imputed to the operator, the failure of a light on a loading machine to work is a malfunction which is clearly visible to the section foreman who is supposed to make frequent checks of the face area. Since the loading machine had already been used to load coal out of one face area before proceeding to the No. 2 entry where it was cited by the inspector for the violation of section 75.503 here involved, the section foreman had plenty of time within which to have observed the lack of a light on the loading machine. Therefore, the section foreman was negligent in this instance and his negligence may be imputed to the operator.

In such circumstances, I find that the violation of section 75.503 was associated with a high degree of negligence because the failure of a light to work on a loading

machine being used at the face is a deficiency which is easily visible to a section foreman and he should have discovered the permissibility violation and should have had it corrected before allowing the loading machine to continue working in the face area where methane is most likely to be released in explosive quantities. Therefore, a penalty of $1,000 will be assessed under the criterion of negligence.

Pyro introduced Exhibits D and E at the hearing for the purpose of supporting its argument that it had MSHA's permission to store coal and rock along the ribs and room necks (Tr. 81-84). Exhibit D is a copy of Pyro's cleanup plan submitted to MSHA. Exhibit E is a copy of MSHA's response to the filing of the plan. MSHA's response states that the plan has been received, but that MSHA does not approve cleanup plans. The first paragraph of the cleanup plan provides as follows (Exh. D):

> At the close of each production shift, coal and rock along each rib will be loaded by a scoop, deposited against a concrete stopping in a well rock-dusted location. It will be wet down. At the close of the last production shift in each 24 hour period, the coal and rock shall be loaded on the belt and removed from the mine.

Even if one assumes for the sake of argument that Pyro was entitled by its cleanup plan to store coal and rock along the ribs and in room necks during two consecutive production shifts and then clean it up and remove it on the third shift, the facts in this case show that the coal had not been removed in accordance with Pyro's cleanup plan because the inspector wrote his citation at 9:45 a.m. and the loose coal had not been removed during the last shift in the 24-hour period as required by Pyro's cleanup plan. The inspector did not agree at the hearing that Pyro has permission to store the coal and rock just because it has filed a cleanup plan containing the language quoted above, but he said that his response to Pyro's claim that it had permission to store the coal he had cited as combustible accumulations was why had they not removed the coal and rock during the third shift in accordance with their cleanup plan (Tr. 90).

Pyro's safety manager did not claim to have the right to allow the coal to accumulate in the quantity and at the time it was found by the inspector. In fact, he conceded on cross-examination that the "right side of the run did need cleaning" (Dep. 30). When he was asked why the coal had been allowed to accumulate, he stated (Dep. 30):

> Well, it's any number of things. We could've had scoop problems, mechanical problems with our scoop, or our machine that cleans this coal up, poor management, just any number of things.

Pyro's safety manager was also asked on cross-examination whether Pyro has taken the position that it could accumulate coal over two shifts and not be in violation of section 75.400. He replied (Dep. 31):

> I don't know they actually made a stand on that, but we did get into this kind of problem with this practice, yes. We were in a situation where we could be cited, I suppose, depending on the Inspector's outlook.

The safety manager stated that Pyro does not now have a raw-coal contract which allegedly requires it to use the practice of accumulating coal for two shifts followed by a cleanup on the third shift. When the safety manager was asked if he would oppose use of that procedure if another raw-coal contract were to be obtained, he said that he was not in a position to make that decision. He said (Dep. 32):

> Oh, I would have my problems with it and talk to management about it, but I don't have in my power to stop management from doing it.

The Secretary's brief (p. 10) in this case shows that Pyro has, indeed, taken the stand that it has the right to accumulate coal for two shifts and then remove it on the third shift. The Secretary cites Judge Koutras' decision in Pyro Mining Co., 7 FMSHRC 13 (1985). In that case, Judge Koutras rejected Pyro's defense claiming that it had a cleanup plan which allowed it to accumulate coal up to the end of the 24-hour production shift for removal during the last part of the 24-hour period. In Judge Koutras' case, Pyro had a slightly better defense than it does in this case, because there was apparently no testimony in Judge Koutras' case showing that Pyro had failed to remove the accumulations during the third shift, as there is in this proceeding. While Judge Koutras was critical of MSHA's regulations which require an operator to submit a cleanup plan but provide for no MSHA oversight or review or approval of the plan, he stated that he was "constrained to follow the regulations [§75.400-2] as promulgated". 7 FMSHRC at 38. Since the accumulations had been allowed to exist during two mining cuts for a period of 4 or 5 hours, Judge Koutras found that a violation of section 75.400 had occurred. 7 FMSHRC at 38.

The citation involved in Judge Koutras' Pyro decision was dated March 6, 1984, and the one here involved is dated March 23, 1984. It is obvious that Pyro's management not only ignored the fact that an MSHA inspector had already cited it for violating section 75.400 under its plan of deliberately accumulating coal during two shifts for removal on the third shift, but that management had allowed the condition to become increasingly serious by failing to remove the accumulations on the third shift in accordance with its cleanup plan which had been filed with MSHA for the purpose of supporting its contention that it had permission to accumulate coal for two shifts and clean the coal up on the third shift. Judge Koutras found it to be a violation for Pyro to accumulate coal for 4 or 5 hours during a single shift. In this case, Pyro had deliberately accumulated coal for more than 24 hours before it was cited by the inspector as part of an imminent-danger order.

In such circumstances, I find that the violation of section 75.400 was associated with a very high degree of negligence and that a penalty of $2,000 is warranted under the criterion of negligence.

Conclusions

I have found above that Pyro is a large operator and that payment of penalties will not cause it to discontinue in business. As to the violation of section 75.503, I have assessed $75 under history of previous violations, $2,000 under gravity, and $1,000 under negligence, for a total amount of $3,075 which should be reduced by 20 percent to $2,460 under the criterion of Pyro's having shown more than an average effort to achieve rapid compliance. As to the violation of section 75.400, I have assessed $200 under history of previous violations, $750 under gravity, and $2,000 under negligence, for a total amount of $2,950 which should be reduced by 20 percent to $2,360 under the criterion of Pyro's having shown more than an average effort to achieve rapid compliance.

DOCKET NO. KENT 84-196

The proposal for assessment of civil penalty filed in Docket No. KENT 84-196 seeks assessment of penalties for

2338838 in conjunction with imminent-danger Order No. 2338837 which has been discussed above in Docket No. KENT 84-184. MSHA, however, included Citation No. 2338838 among the violations alleged in Docket No. KENT 84-196. Therefore, the violation of section 75.308 alleged in Citation No. 2338838 is being considered in Docket No. KENT 84-196 despite its total interrelationship with the facts heretofore discussed in Docket No. KENT 84-184.

Additional Findings of Fact

5. The inspector testified that he found it necessary to cite a violation of section 75.308 after he had entered the No. 2 entry where the loading machine was sitting. The operator of the loader was standing near the controls on the right side of the machine which had been loading coal near the face of the No. 2 entry. The inspector walked to the left side of the machine and made a test for methane at a point about 2 feet from the roof and 4 feet from the rib. The reading indicated the presence of 1.3 percent methane (Tr. 32). 9/ The inspector had just had his methane detector

8/ Section 75.308 provides:

> If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane.

9/ Section 75.308 provides for methane tests to be made no closer to the roof than 1 foot. Pyro's brief (p. 2) incorrectly alleges that the inspector violated section 75.308 by taking the methane reading "as close to the roof as he could." The inspector was asked if he took the reading as close to the roof as he could, but his answer was that he "got as close" to the "last row of bolts" as he could. The inspector had already stated that he took the reading 2 feet from the roof (Tr. 32).

tested and charged before he left his office to make the inspection of Pyro's mine and was confident that his reading was correct (Tr. 29-31). The inspector then moved backward from the front of the loading machine and took another reading with his methane detector at a point 10 feet from the rib, 16 inches from the roof, and about 6 feet from the loader. The second reading indicated the presence of 2.3 percent methane (Tr. 33). The inspector made a drawing of the loading machine at its location in the No. 2 entry and entered the figures "1" and "2" on that drawing to show where he obtained the methane readings (Exh. 7).

6. Because of the loose coal accumulations and permissibility violations described above, the inspector considered the presence of 2.3 percent methane to be a very dangerous condition and advised Hughes, Pyro's safety manager, that he was issuing an imminent-danger order (Tr. 33). Hughes stated that the methane readings were caused by exploding ammonia nitrate to produce the coal which the loading machine had been loading just before the inspector entered the No. 2 entry (Tr. 34). The inspector doubted that his reading was for any gas other than methane, but took a bottle sample for laboratory analysis and used a red pencil to make an "S" on the card accompanying the sample. The red letter "S" was a signal for the laboratory to take into consideration that the sample required special attention because the inspector requested that the laboratory provide a complete analysis of the sample which would show the presence of anything unusual in the sample (Tr. 41; 43). Exhibit 3 shows the results of the laboratory analysis of the inspector's bottle sample and indicates that the mine atmosphere contained .23 percent carbon dioxide, 20.48 percent oxygen, 1.5 percent methane, .058 percent ethane, and 77.939 percent nitrogen (Tr. 44).

7. Although the loading machine was not being operated, power was flowing to the machine through its trailing cable and turning off the power at the point where the cable entered the machine could create an arc and cause an explosion if the methane content in the air continued to rise (Tr. 59). The inspector asked Hughes to have the power turned off at the power center outby the face, but Hughes took a methane reading himself and obtained a reading a few tenths less than the inspector's reading of 2.3 percent, but Hughes does not recall for certain the exact percentage registered on his methane detector (Dep. 17). Hughes then discussed his theory about the presence of ammonia nitrate during a period lasting about 5 minutes. It was necessary for the inspector to ask a second time for the power to be turned off at its source before Hughes directed that the power be disconnected (Tr. 36; 58). The operator of the loading machine then left the face area and had the power disconnected by a mechanic (Tr. 145).

part of imminent-danger Order No. 2505050 which was issued on April 18, 1984, nearly 1 month after issuance of the imminent-danger order discussed above (Exh. 12). The imminent-danger order in this instance was issued because the inspector encountered coal dust and float coal dust extending for a distance of 2,100 feet along the 2 west conveyor belt. Nine bottom rollers were turning in coal dust and float coal dust and the dust had to be 8 inches deep on the mine floor in order to come in contact with the rollers (Tr. 168; 172; Exh. 13). The accumulations were associated with an unusual occurrence in that the conveyor belt had been rockdusted where it passed through the crosscuts, but the conveyor belt had not been rockdusted along the intervals of about 50 feet between crosscuts, so that when the inspector examined the entry in which the conveyor belt was situated, he saw a checkerboard effect of alternating black and white areas extending down the length of the belt as far as he could see (Tr. 166). The inspector considered the accumulations to be very dangerous because the rollers turning in coal dust might become hot enough from friction to cause a mine fire or an explosion (Tr. 172; 177).

Citation No. 2338838 3/23/84 § 75.308 (Exhibit 10)

The violation alleged in Citation No. 2338838 is based upon the inspector's having obtained a methane reading of 1.3 percent on the left side of the loading machine at a point about 2 feet from the mine's roof and 4 feet from the rib. The inspector moved backward from the front of the loading machine and obtained a second methane reading of 2.3 percent at a point 10 feet from the rib, 16 inches from the roof, and about 6 feet from the loading machine. The inspector's methane detector had just been checked for accuracy before he left his office and he was confident that his readings were correct (Finding No. 5 above). Because of the loose coal accumulations and permissibility violations discussed at great length above, the inspector considered a methane concentration of 2.3 percent to constitute an imminent danger and he issued the citation of section 75.308 as part of imminent-danger Order No. 2338837 also previously discussed under Docket No. KENT 84-184 above.

Pyro's brief (pp. 5-7) raises quite a few arguments in support of its contention that a violation of section 75.308 was not proven. Pyro's brief (p. 5) first notes that the citation refers to the taking of a bottle sample of air and contends that the analysis of that air sample revealed only 1.5 percent methane, instead of the volume of

2.3 percent methane mentioned in the citation. The inspector's testimony shows quite clearly that his reading of 2.3 percent methane was revealed by his methane detector. His citation was written just a short time after he obtained the reading of 2.3 percent methane, whereas the results of the analysis of the bottle sample were not known until after the bottle sample had been analyzed by MSHA's laboratory located in Mount Hope, West Virginia (Tr. 43-44; Exh. 3).

Section 75.308 is quoted in full in footnote 8 on page 20 above. That section refers to testing for methane and section 75.308-2 provides for such tests to be made with a methane detector. There is no requirement in the Regulations that a violation of section 75.308 be proven only by an inspector's obtaining a bottle sample of the mine atmosphere and waiting until a laboratory has analyzed the methane content in that air sample before determining whether or not there has been a violation of section 75.308. The inspector explained in great detail all of the procedures which had been utilized to establish the accuracy of his methane detector before he left the MSHA office on March 23, 1984, the day he wrote the citation for the violation of section 75.308 here involved (Tr. 29-30). Consequently, there is no merit to Pyro's contention that the reading of 2.3 percent methane obtained by the inspector with his methane detector was incorrect just because a laboratory analysis of a bottle sample of air indicated a methane content of only 1.5 percent. Moreover, a violation of section 75.308 may be found to have occurred if there is a concentration of only 1.5 percent methane. Therefore, even if one assumes that the inspector's methane reading of 2.3 percent was in error, the violation would still exist if Pyro failed to take immediately the steps required by section 75.308 to reduce the methane concentration to less than 1 percent.

Pyro's brief (p. 5) relies on several decisions, such as a Commission judge's decision in CF&I Steel Corp., 3 FMSHRC 2819 (1981), in which the judge held that no violation of section 75.308 was proven because the operator immediately took the steps required by section 75.308 to reduce the methane concentration as soon as the high concentration was found to exist. Pyro argues that its safety manager in this case took immediate steps of having the power turned off on all face equipment as soon as it was determined that a dangerous quantity of methane was found by the inspector. Consequently, Pyro argues that the inspector improperly issued Citation No. 2338838 alleging that Pyro had violated section 75.308.

reading of 2.3 percent methane, he requested the safety manager to have the power to the loading machine cut off immediately, but that the safety manager claimed that the inspector's reading of what appeared to be methane was caused by the ammonia nitrate used by Pyro to blast coal from the face. The inspector replied that it was peculiar that Pyro's mine would produce an erroneous methane reading because that had not occurred at other mines. The inspector said that he then took a bottle sample of the mine atmosphere and that he marked a red letter "S" on the card accompanying the sample to alert the laboratory personnel that the sample was one which required special attention. The inspector requested the laboratory to make an analysis of every element in the bottle, while giving particular attention to detecting the presence of any gas associated with use of ammonia nitrate as an explosive. The inspector said that the discussion with the safety manager took about 5 minutes and that it was then necessary for him to ask the safety manager a second time to have all power turned off so that there would not continue to be a danger of an explosion from the lack of permissibility of the loading machine which was situated only 6 feet from the place where the inspector obtained a methane reading of 2.3 percent (Finding No. 5 above).

The inspector's testimony supports a finding of a violation of section 75.308 because Pyro's safety manager did not immediately have the power to the loading machine turned off as soon as he was asked to do so by the inspector. Instead of performing the steps required by section 75.308 to turn off power and make adjustments to lower the methane concentration, the safety manager engaged in a 5-minute argument with the inspector about whether the inspector's methane detector was reading methane or some residue of ammonia nitrate.

It is true, as Pyro argues in its brief (p. 5), that the safety manager testified in his deposition that he took immediate steps to have the power turned off and that all that was necessary to reduce the methane concentration in the mine atmosphere was to have the face area in the No. 2 entry sprayed with a water hose (Dep. 16; 24). While it is true that the safety manager claims to have taken immediate steps to reduce the methane concentration, his detailed testimony pertaining to the events described by the inspector do not support his claims.

sion that after he was advised by the inspector that a dangerous quantity of methane had been detected, the safety manager asked where the inspector had obtained the high reading, and proceeded to take some methane readings himself and he said that he found some readings which were a few tenths less than the reading obtained by the inspector, but that he could not recall the exact reading (Dep. 17). The safety manager's action of taking additional readings after he had been advised of the high readings by the inspector was a violation of section 75.308 under the Commission's decision in Mid-Continent Coal and Coke Co., 3 FMSHRC 2502 (1981). In that case, the Commission affirmed a judge's finding of a violation of section 75.308 in the following discussion:

> The facts are undisputed. Approaching the face of a crosscut, both the inspector and respondent's superintendent observed a continuous miner backing away from the face with the amber light on its methane monitor glowing. The glowing light indicated the presence of over 1 percent methane. The superintendent proceeded to the face and took two methane readings before ordering the continuous miner deenergized.
>
> We interpret 30 CFR 75.308 and its statutory authority, section 303(h)(2) of the Act, to require electric face equipment in a working place be deenergized immediately when 1 percent or more of methane is detected in such working place. After such methane accumulation had been detected by the methane monitor here, to continue an ignition source while rechecking the monitor's reading was a violation of the regulation alleged. The judge is affirmed.

3 FMSHRC at 2504.

Additionally, the safety manager's denial of having debated the inspector's finding of a high concentration of methane by asserting a claim that the inspector's methane detector had been rendered erroneous by Pyro's use of ammonia nitrate as an explosive is not convincing as his answer to that question shows:

> A. You know, I really, I don't remember. I remember. I remember on a[n] occasion, I don't know if it was on this section, I do remember talking to him about ammonium nitrate. We were

> using this Topex Water Gel, and these spotters had been acting up quite a bit, after, you know, go to a place right after it shot. And they had been going crazy, acting up, and I was trying to find out what this was, what was causing this. I remember talking to Tom [the inspector] on occasion about the ammonium nitrate. I don't remember, I don't think it was right here. I wasn't stalling for time as far as shutting the equipment down. I didn't carry on any long conversation with him about anything. I don't remember the ammonium nitrate conversation at this point on this section.

Deposition, p. 19. The safety manager also agreed on cross-examination that he took no notes pertaining to the location of equipment or incomplete mining of crosscuts on the day the citation was issued and took no notes concerning his conversation with the inspector (Dep. 26; 34). The inspector would have had no reason to take a bottle sample on March 23, 1984, mark the sample with a special red letter "S", and request the laboratory personnel to give special attention to detecting the presence of ammonia nitrate if the safety manager had not brought up the subject of ammonia nitrate at the time the inspector asked the safety manager to turn off the power and make the required adjustments to reduce the concentration of methane (Tr. 41-44). In such circumstances, I find that the inspector's testimony is more credible than that of the safety manager and I find that a violation of section 75.308 occurred because of the safety manager's having engaged in a 5-minute debate with the inspector about the accuracy of the methane reading despite the fact that his own methane detector had shown at least 1.5 percent methane (Tr. 58; Dep. 17).

Pyro's brief (p. 6) also claims that the inspector improperly cited a violation of section 75.308 because that section refers to "the air at any working place" and that section 75.2(e)(2) defines "working place" as "the area of a coal mine inby the last open crosscut." I have already shown that a violation of section 75.503 is not defeated by an argument that the loading machine was not inby the last open crosscut at the time it is cited for a violation of section 75.503. It is somewhat difficult to determine whether Pyro is claiming that the loading machine was not inby the last open crosscut because it was sitting in the crosscut, or whether Pyro is arguing that no violation of section 75.308 was proven because the inspector did not personally see the loading machine being used inby the last open crosscut. Regardless of which argument Pyro is making, it is not a valid argument because no witness denied that

the loading machine had just loaded at least one shuttle car with coal before it was cited for the permissibility violation. The loading machine had just backed up in preparation for loading another shuttle car with coal when the inspector made his methane readings. A loading machine cannot load coal blasted from the working face without being in a working place. If that working place is in the crosscut itself, then the last open crosscut is either the crosscut in which the loading machine is sitting or it is the next crosscut outby the place where the loading machine is sitting (Exhs. 6 and 7).

In this instance, Pyro is confusing the last open crosscut with the crosscut in which the loading machine was sitting. Pyro's safety manager testified that the inspector had correctly depicted on Exh. 6 the state of completion of the working section on March 23, 1984 (Dep. 22). Exhibit 6 clearly shows by use of the letter "L" that the loading machine was sitting in a crosscut which had not been completed because there was an incomplete (unblasted) cut of coal remaining in the crosscut between the Nos. 1 and 2 entries, between the Nos. 3 and 4 entries, between the Nos. 5 and 6 entries, and between the Nos. 6 and 7 entries. A crosscut which still has that much virgin coal in it cannot possibly be designated as the "last open crosscut". Therefore, the last open crosscut on March 23, 1984, was the one outby the place where the loading machine was sitting when the inspector cited it for a violation of section 75.308.

Since the Commission has already held in Solar Fuel Co., 3 FMSHRC 1384 (1981), that a piece of equipment may be cited for a violation of section 75.503 so long as it is intended to be used inby the last open crosscut, and inasmuch as a violation of section 75.308 does not depend upon the location of equipment so long as the methane is detected in a working place, I find that the evidence clearly shows that the necessary prerequisites for citing violations of both sections 75.503 and 75.308 existed on March 23, 1984, because a reading of 2.3 percent methane was obtained by the inspector within 6 feet of the loading machine which was situated within 15 feet of the face of the No. 2 entry for the purpose of continuing the loading of a pile of coal which had recently been blasted from the face of the No. 2 entry (Tr. 33; 129).

Pyro's brief (p. 7) makes two additional arguments in trying to show that no violation of section 75.308 was proven. Both arguments are related to Pyro's contention that it was providing adequate ventilation to the working place where the violation of section 75.308 was cited.

Pyro first claims that it had to do nothing to reduce the methane concentration below 1 percent other than spray water in the area in which the high reading had been obtained. The inspector, on the other hand, claims that it was necessary to erect a curtain between the Nos. 2 and 3 entries in the crosscut outby the loading machine in order to direct enough air to the working face of the No. 2 entry to drive the excess methane from the left side of the loading machine. The inspector testified that Pyro's failure to erect a curtain at that point caused most of the air to pass from the No. 4 entry directly to the No. 1 entry which is a return entry (Tr. 46).

Pyro's brief (p. 7) also contends that the Secretary's counsel incorrectly argues that the testimony of the operator of the loading machine shows that no curtain had been erected between the Nos. 2 and 3 entries. Pyro claims, on the contrary, that the operator of the loading machine testified that the line curtain was already up and that all he had to do to dilute the methane concentration was to spray water in the vicinity of the left side of the loading machine. If Pyro's representative will read the loader operator's testimony again at pages 156 and 157 of the transcript, he will find that the loader operator's statement to the effect that the curtain was already up refers to the line brattice which is required by section 75.302-1 to be within 10 feet of the working face when the loading machine is loading coal. The loader operator clearly states on page 157 that he was referring to the face curtain as being up, whereas the inspector was "talking about a curtain back" and the loader operator did not know whether that curtain was up or not before the inspector found the high methane reading.

Pyro's entire argument about the fact that it had already erected a curtain between the Nos. 2 and 3 entries is based on either a deliberate obfuscation of the facts or upon an inadvertent misunderstanding of the facts. Even the safety manager's Exhibit C, which he drew to support his claim that there was a curtain directing air to the face of the No. 2 entry, is based on a showing that there was a face curtain beside the loading machine as required by section 75.302-1. The inspector's Exhibits 6 and 7, on the other hand, show that a curtain was needed in the crosscut outby the face curtain to direct air to the face of the No. 2 entry. The inspector's exhibits and testimony explain that having a curtain beside the loading machine did not succeed in keeping the methane concentration below 1 percent because there was not enough air being directed into the No. 2 entry at the outby crosscut in order for the line curtain beside the loading machine to have the desired effect of

directing a proper amount of air to the working face so as to sweep the methane out of the face area.

Pyro's safety manager conceded on cross-examination that the inspector had correctly shown on Exhibit 6 the existence of cuts of coal still standing in the crosscut which the safety manager's Exhibit C shows to be a completely open crosscut (Dep. 27). The safety manager drew a diagram of the working section which was in error because of his failure to take notes as the inspector had done. Therefore, Pyro is simply arguing unproven facts in claiming that it had already erected a curtain between the Nos. 2 and 3 entries before the inspector found the reading of 2.3 percent methane. Therefore, I reject all of Pyro's arguments to the effect that it was fully ventilating the face of the No. 2 entry where the reading of 2.3 percent methane was found by the inspector.

Assuming, arguendo, that all Pyro had to do to reduce the methane concentration to less than 1 percent was to spray water near the face of the No. 2 entry, the Commission held in Mid-Continent Coal and Coke Co., 3 FMSHRC 2502, 2503 (1981), that a ventilation procedure which has to be performed repeatedly to keep the methane content below 1 percent is not effective and that it constitutes a violation of section 75.308 to allow methane repeatedly to exceed 1 percent throughout the working shift because the intent of section 75.308 is that the operator will provide enough ventilation to keep the methane level continuously below 1 percent.

I have already shown in the discussion above that the safety manager's testimony does not support Pyro's claim that it immediately took action to reduce the methane concentration as soon as it was brought to the safety manager's attention by the inspector. Pyro also relies upon the testimony of the loading-machine operator in support of its claim that it immediately reduced the methane concentration when it was made aware of it by the inspector. Pyro relies upon a single statement by the loading-machine operator at transcript page 120. All the loading-machine operator said there was that when Pyro's safety manager told him to "knock the power on the machine", he "went and found a mechanic and told him" that the safety manager wanted the power knocked. The loading-machine operator's testimony in no way disputes the inspector's testimony to the effect that a 5-minute debate with the safety manager occurred before the safety manager finally asked the loading-machine operator to have the power turned off.

The lengthy discussion above shows that all of Pyro's arguments claiming that no violation of section 75.308 occurred must be rejected as not being supported by the

preponderance of the evidence. I find that the Secretary proved that a violation of section 75.308 occurred as alleged by the inspector in Citation No. 2338838.

Assessment of Penalty

Size and Ability to Pay Penalties

The findings heretofore made with respect to the size of Pyro's business and Pyro's ability to pay penalties are equally applicable for assessment of all penalties and need not be repeated here.

Good-Faith Effort To Achieve Rapid Compliance

The Secretary's brief (p. 14) asserts that Pyro failed to make a good-faith effort to achieve rapid compliance with respect to the violation of section 75.308, but the Secretary does not state how Pyro failed to do so. It is possible that the Secretary's counsel is mixing Pyro's failure to begin reducing the methane concentration immediately with the question of whether Pyro made a good-faith effort to achieve rapid compliance after the violation was cited. If Pyro, immediately upon being advised of the high methane reading, had taken the steps of cutting off the power and working on ventilation, there would not have been a violation of section 75.308 and therefore nothing to abate. After Pyro's safety manager discontinued his debate with the inspector as to whether a high concentration of methane had been detected, Pyro did begin with commendable speed to abate all of the violations cited by the inspector, including erecting the curtain between the Nos. 2 and 3 entries so as to sweep out the methane concentration. Therefore, I believe that Pyro's unusually rapid effort to reduce the methane concentration applies as to the violation of section 75.308, just as it did with the previous violations discussed above, and that any penalty assessed under the other criteria should be reduced by 20 percent under the criterion of Pyro's good-faith effort to achieve rapid compliance.

History of Previous Violations

Exhibit 1 shows that Pyro has not previously been cited for a violation of section 75.308. Therefore, no part of the penalty to be assessed for the violation of section 75.308 should be assigned under the criterion of history of previous violations.

Negligence

A violation of section 75.308 can hardly occur without a finding that an operator is negligent. It was very negligent for Pyro's safety manager to enter into a debate with the inspector when the inspector advised him that he was issuing an imminent-danger order because he had just found a high reading of methane, along with hazardous permissibility violations on the loading machine which was situated within 6 feet of the place where 2.3 percent methane had been detected. The loading-machine operator was waiting for another shuttle car to appear before continuing to load coal. Therefore, no great loss of coal production would have occurred if the safety manager had immediately directed the power to be turned off to all face equipment so that efforts could be made to reduce the high reading found by the inspector (Finding No. 7 above).

Additionally, the preponderance of the evidence shows that Pyro had failed to erect a curtain between the Nos. 2 and 3 entries so that an adequate amount of air could be directed to the face of the No. 2 entry to sweep out the high concentration of methane found by the inspector on the left side of the loading machine (Tr. 45-46).

There are some facts to be considered in Pyro's favor. The loading-machine operator testified that he took a reading for methane before he started loading and that he did not detect any methane (Tr. 119). He said that only 2 minutes elapsed between the time he made his check for methane and found none and the time the inspector made his reading and found a significant amount of methane (Tr. 124). The inspector agreed on cross-examination that it would have been possible for the loading-machine operator to check for methane and not find any and thereafter use the loading machine to load a shuttle car of coal and make another check for methane and find a significant amount (Tr. 61).

The loading-machine operator testified that Pyro makes a lot of time studies to determine how long it takes to load a shuttle car with coal and that it takes only 16 seconds (Tr. 126). There is, of course, a methane monitor on the loading machine which is supposed to show an amber light when the machine encounters as much as 1 percent of methane. The monitor did not show any methane in this instance. While the loading-machine operator did not push the methane monitor's check button on the loader just prior to loading coal in the No. 2 entry, he believed that the monitor was operative because it has a white light which indicates that it is receiving power. It is possible for the monitor to be energized and still fail to detect methane, but the loading-machine operator did not think it was out of operation on

March 23, 1984, when the violation was cited, because he did push the button to determine if the monitor was operating after the inspector had left and it did work, so the monitor should have detected the presence of methane before the inspector found it (Tr. 154; Dep. 20).

The above review of the pertinent evidence pertaining to Pyro's negligence with respect to the violation of section 75.308 shows that the violation was associated with a relatively low degree of negligence because Pyro's safety manager had previously become aware of some erratic readings by methane detectors when Topex Water Gel had been used as an explosive (Dep. 19). While that difficulty does not justify his reluctance to accept the inspector's statement that a 2.3 percent methane reading had been found, it does show that the safety manager had a reason for entering into a discussion with the inspector. In such circumstances, I find that a penalty of $200 should be assessed under the criterion of negligence.

Gravity

The seriousness of the violation of section 75.308 is equal to the hazards which I previously discussed in assessing a penalty for the violation of section 75.503 because it was the inspector's finding of a concentration of 2.3 percent methane within 6 feet of a loading machine having permissibility violations which caused the inspector to issue imminent-danger Order No. 2338837 which has already been discussed under the heading of Docket No. KENT 84-184. I found above that the violation of section 75.503 was extremely hazardous and assessed a penalty of $2,000 under the criterion of gravity. Since the methane concentration contributed to the hazards of an explosion or fire and since the violation of section 75.308 was issued as a part of the imminent-danger order, I believe that an identical finding of extreme danger is warranted for the violation of section 75.308 and that a penalty of $2,000 should be assessed under the criterion of gravity.

Conclusions

Taking into consideration that Pyro is a large operator with ability to pay penalties, that no amount should be assessed under Pyro's history of previous violations, that $200 should be assessed under the criterion of negligence, and that $2,000 should be assessed under the criterion of gravity, for a total penalty of $2,200, and that the penalty should be reduced by 20 percent under the criterion of Pyro's

good-faith effort to achieve rapid compliance, I find that a penalty of $1,760 should be assessed for the violation of section 75.308 alleged in Citation No. 2338838.

Citation No. 2505051 4/18/84 § 75.400 (Exhibit 13)

Citation No. 2505051, alleging a violation of section 75.400, was issued as a part of imminent-danger Order No. 2505050, but the factual situation was entirely unrelated to the violations heretofore discussed in this proceeding. In this instance, the hazard which caused the inspector to issue the imminent-danger order was the possibility of a fire or explosion because of the inspector's having found loose coal, coal dust, and float coal dust along the entire 2,100-foot length of a conveyor belt, except at places where the conveyor belt passed through crosscuts where the belt entry had been rockdusted. The inspector found that nine bottom belt rollers along the belt were turning in coal dust and he stated that the coal dust had to be 8 inches deep on the mine floor in order for the dust to come into contact with the rollers (Finding No. 8 above).

Pyro did not present any evidence to controvert the inspector's testimony, but in its brief (pp. 6 and 8), Pyro first alleges that the inspector testified that he could not say that the operator should have known about the condition and failed to do anything about it (Tr. 182). Then Pyro refers to the Secretary's brief (p. 9) and claims that counsel for the Secretary there stated that the inspector's testimony does not seem credible. Pyro's brief (p. 8) then states that the Secretary's counsel is apparently "doubting the credibility of his own witness".

The above allegations in Pyro's brief are based on a question asked during Pyro's cross-examination of the inspector. Before one can understand the significance of Pyro's question and the inspector's answer to the question, it is necessary to provide some explanatory information. Inspectors write citations and orders on MSHA Form 7000-3. That form has a "Section III" at the bottom and in that portion of the form, inspectors check "blocks" to indicate their evaluation of the six assessment criteria for the purpose of assisting MSHA in proposing civil penalties. The portion of the Act providing for issuance of imminent-danger orders is section 107(a) and that section also provides that an inspector may issue a citation under section 104(a) for a violation of a mandatory safety standard if he believes that a violation is associated with the imminent danger which he is describing in his order. Since the order is not, by itself, alleging a violation, the inspector is not required to fill in the blocks in Section III of a Form

7000-3 used for issuing an imminent-danger order because no civil penalty has to be proposed for the issuance of an imminent-danger order by itself, but a civil penalty does have to be proposed for any violation alleged in a citation which is issued in conjunction with the imminent-danger order.

In this instance, the inspector had started to fill in the blocks in Section III of his imminent-danger order and had checked the first item under Section III which pertains to negligence. In doing so, he checked the "D" block to indicate that he thought "high" negligence was involved, but then the inspector recalled that he did not need to fill out Section III on a Form 7000-3 which is being used to issue an imminent-danger order and the inspector did not check any more of the blocks under Section III on the imminent-danger order, but he filled out all pertinent blocks under Section III on the citation issued in conjunction with the order because he knew that a civil penalty would have to be proposed with respect to the violation of section 75.400 alleged in the citation. When the inspector filled out Section III of the citation, however, he checked the "C" block under negligence to indicate "moderate" negligence, as opposed to the "high" negligence which he had checked under Section III of the order.

When Pyro's representative asked the inspector on cross-examination why he had rated Pyro's negligence on the citation as being less than he had rated negligence on the order, the following colloquy occurred (Tr. 182):

> A Well, I've got to follow directions, or instructions, and when you mark "high", then it can't be a 104(a), it's got to be a 104(d). That means you knew, or should have known, and didn't care nothing about it.
>
> Q Well, in the coal mines--
>
> A And I couldn't say that.
>
> Q Sir?
>
> A I couldn't say that.

I believe that Pyro has misinterpreted the inspector's statement that he "couldn't say that". The inspector did not mean that the evidence would not support the findings which are required to be made before an inspector can issue an unwarrantable-failure citation under section 104(d) of the Act, but that he could not designate the violation as unwarrantable failure and still issue it in conjunction with an imminent-danger order because an inspector cannot issue an

unwarrantable-failure citation under section 104(d) of the Act unless he first finds that the violation did not cause an imminent danger. Since the inspector had already concluded that the nine bottom rollers turning in loose coal dust accumulations constituted an imminent danger, he was required to issue a citation under section 104(a) to allege a violation of section 75.400 and he had been instructed by MSHA that if he checked "high" negligence in Section III of a citation, he would be required to issue the citation under the unwarrantable-failure provisions of section 104(d), and that could not be done at the same time he was issuing an imminent-danger order.

Pyro is also misinterpreting the Secretary's brief in claiming that the brief indicates that the Secretary's counsel is "doubting the credibility of his own witness". The Secretary's brief (p. 9) referred to the answer filed by Pyro to the Secretary's proposal for assessment of civil penalty. In that answer filed in Docket No. KENT 84-196, Pyro stated that the belt examiner did not report any accumulations of loose coal and coal dust on the day the citation was issued. Therefore, when counsel for the Secretary stated in his brief (p. 9) that Pyro's answer (denying the existence of accumulations because its belt examiner did not report those accumulations) "does not seem credible", he was doubting the credibility of Pyro's belt examiner, rather than the credibility of the inspector. Pyro did not present its belt examiner as a witness in this proceeding. Consequently, I have no way to evaluate the credibility of his failure to report the accumulations cited by the inspector on April 18, 1984.

The inspector's testimony, as summarized in Finding No. 8 above, supports a finding, and I so find, that a violation of section 75.400 occurred.

Assessment of a Penalty

Good-Faith Effort To Achieve Rapid Compliance

The inspector testified that after he issued the imminent-danger order and citation for the violation of section 75.400 here involved, that the superintendent of Pyro's mine personally ordered everyone on the section to work on cleaning up the belt entry and that there was so much coal dust and loose coal along the belt that the belt had to be advanced periodically to make room on the belt for depositing the coal resulting from shoveling along the belt. The inspector had planned to leave the mine after he wrote the order and return the next day to terminate the order after the coal had been cleaned up, but the miners cleaned up the coal very rapidly and then began applying rock dust in the conveyor-belt entry

by using two rock dusters, beginning simultaneously from each end of the belt, so as to apply rock dust as fast as possible The inspector said that they did such a good job, that he stayed at the mine so that he could terminate the order as soon as they had finished cleaning up and rockdusting (Tr. 17 176-177).

In view of the outstanding effort made by Pyro to achiev rapid compliance, I find that a reduction of 30 percent of th penalty assessed under the other criteria should be made for the violation of section 75.400.

History of Previous Violations

Exhibit 11 shows that Pyro has a history of 40 previous violations of section 75.400 from February 8, 1983, to and including March 27, 1984. Eleven of those 40 violations occurred during the 3 months preceding the month in which the violation of section 75.400 here under consideration occurred In view of that very adverse history of previous violations of section 75.400, I find that an amount of $400 should be assigned under the criterion of history of previous violation for the violation of section 75.400 alleged in Citation No. 2505051.

Negligence

I have already rejected the claim in Pyro's brief (p. 8) to the effect that the inspector could not say that the operator was aware of the loose coal and coal dust accumulations in the belt entry. Section 75.303 requires that belt conveyors on which coal is carried be examined after each coal-producing shift has begun. Therefore, Pyro's section foreman should have been aware of the loose coal and coal dust accumulations which extended for the entire length of the conveyor belt for a distance of 2,100 feet. The section foreman's negligence in failing to do anything about the accumulations until they were found by the inspector may be imputed to the operator. Assuming, arguendo, as Pyro alleges, that its belt examiner failed to report the existence of coal accumulations on the day Citation No. 2505051 was issued, the former Board of Mine Operations Appeals held in The Valley Camp Coal Co., 3 IBMA 463 (1974), that a coal company may not rely upon a preshift examiner's report to exculpate itself from the high degree of care imposed upon it by the Act.

The section foreman should have been able to see that the conveyor-belt entry had not been rock dusted or cleaned, except at crosscuts, just as the inspector did when he looked down the belt entry. I find that the violation of section 75.400 was associated with a high degree of negligence and that a penalty of $500 should be assessed under the criterion of negligence.

Gravity

The inspector considered the loose coal, coal dust, and float coal dust along the entire length of the belt conveyor to be hazardous enough to warrant issuance of an imminent-danger order because he believed that the friction of nine bottom rollers turning in float coal dust might cause a mine fire (Tr. 173). He said that there was "just black float dust all the way down the belt" except at the crosscuts where rock dust had been applied (Tr. 172; 177).

I assessed a penalty of $750 under the criterion of gravity for the violation of section 75.400 previously considered under Docket No. KENT 84-184 above. In that instance, most of the loose coal and coal dust accumulations were located about 300 feet from the ignition hazard. In this instance, the rollers turning in float coal dust were located at intervals along the conveyor belt and therefore constituted a more immediate threat to causing a fire than the violation previously considered. Therefore, I believe that the instant violation of section 75.400 constituted a greater hazard than the previous violation of section 75.400. Consequently, I find that a penalty of $1,500 should be assessed under the criterion of gravity.

Conclusions

In view of the fact that Pyro is a large operator with ability to pay penalties, that a penalty of $400 should be assessed under the criterion of history of previous violations, that $500 should be assessed under the criterion of negligence, that $1,500 should be assessed under the criterion of gravity, for a total penalty of $2,400, and that the penalty should be reduced by 30 percent under the criterion of Pyro's outstanding effort to achieve rapid compliance, I find that a penalty of $1,680 should be assessed for the violation of section 75.400 alleged in Citation No. 2505051.

SETTLEMENT PROPOSED IN DOCKET NO. KENT 84-238

The proposal for assessment of civil penalty in Docket No. KENT 84-238 seeks to have penalties assessed for violations of sections 75.523-1, 75.400, and 75.807. All of the citations involved were written in June 1984 under section 104(a) of the Act and do not involve hazardous circumstances such as those heretofore considered in the other two contested cases involved in this consolidated proceeding. After the parties had presented evidence with respect to the issues raised in Docket Nos. KENT 84-184 and KENT 84-196, they requested that I approve a settlement agreement under which respondent would pay reduced penalties totaling $295 instead of penalties totaling $344 proposed by MSHA.

It has been made clear in the preceding portion of this decisic that civil penalties have to be assessed pursuant to the six criteria listed in section 110(i) of the Act. The parties' settlement agreement shows that they agree with MSHA's evaluation of three of the assessment criteria, namely, that payment of civil penalties will not cause Pyro to discontinue in business, that Pyro is a large operator, and that Pyro demonstrated a good-faith effort to achieve rapid compliance after the violations were cited. A brief discussion of the remaining three criteria of negligence, gravity, and history of previous violations is required in order to determine whether the parties' settlement proposal should be approved.

The aforementioned violation of section 75.523-1 was alleged in Citation No. 2505113 which states that the deenergization bar on a roof-bolting machine would not operate when tested by striking the lever. Section 75.523-1 requires that self-propelled electric face equipment be provided with a device that will quickly deenergize the tramming motor of the equipment in the event of an emergency. MSHA generally proposes civil penalties pursuant to the assessment formula described in 30 C.F.R. § 100.3. The usual procedures were followed in Docket No. KENT 84-238 and all of the civil penalties proposed by MSHA were derived by utilizing the civil penalty formula described in section 100.3. An appropriate amount was allocated under the criteria of the size of Pyro's business and Pyro's having made a good-faith effort to achieve compliance after the violations were cited. There was no need to reduce the penalties under the criterion of whether payment of penalties would cause Pyro to discontinue in business because Pyro has stipulated that payment of penalties will not adversely affect its ability to continue in business.

MSHA did not assess any portion of the penalties proposed in this docket under the criterion of history of previous violations because application of the principles described in section 100.3(c) of MSHA's assessment formula did not require assignment of any penalty points under that criterion. Normally, when a judge is considering a settlement proposal, he does not have the computer printout listing previous violations which is available in this consolidated proceeding. Consequently, the judge is generally limited to an examination of MSHA's penalty formula to determine whether it has been accurately applied in a given case. In this proceeding, counsel for MSHA has provided me with Exhibits 1 and 11 which list previous violations and show that Pyro has been assessed a penalty for a single previous violation of section 75.523-1. That violation occurred over a year prior to the violation alleged in Citation No. 2505113. Consequently, I I find that application of section 100.3(c) of MSHA's formula

appropriately resulted in assignment of zero penalty points for the violation of section 75.523-1 under the criterion of history of previous violations.

MSHA considered that the violation of section 75.523-1 was associated with a low degree of negligence and that the gravity of the violation was moderate because any injury resulting from the failure of the panic bar to operate would probably have resulted in lost workdays for a single person. Under the parties' settlement agreement, Pyro has agreed to pay the full penalty of $68 proposed by MSHA. I find that the penalty was reasonably determined under MSHA's assessment formula and that Pyro's agreement to pay the penalty in full should be approved.

The aforementioned violation of section 75.400 was alleged in Citation No. 2505114 and stated that loose coal and coal dust and float coal dust had been permitted to accumulate around the power center and in all cuts across the unit and in some room necks, but the citation does not state how deep the coal accumulations were or attempt to give an estimate in feet as to the extent of the accumulations. While absence of those measurements does not defeat a finding that the violation occurred (Old Ben Coal Co., 2 FMSHRC 2806 (1980)), measurements do assist in evaluating both negligence and gravity. MSHA considered the violation to be associated with moderate negligence and to be somewhat serious because any injury resulting from the violation would be likely to cause lost workdays for up to 12 miners. MSHA proposed a penalty of $178 for the violation which Pyro has agreed to pay in full.

As was noted above in discussing the violation of section 75.523-1, application of section 100.3(c) of MSHA's penalty formula in this proceeding results in assignment of zero penalty points for the violation of section 75.400 under the criterion of history of previous violations. The penalties which I have previously assessed under the criterion of history of previous violations for the contested violations involved in this consolidated proceeding resulted in assignment of up to $400 because of Pyro's unfavorable history of previous violations of section 75.400. I have noted in approving other settlement proposals that section 100.3(c) of MSHA's penalty formula does not, in some cases, give adequate consideration of the criterion of history of previous violations because it is based on a formula which merely provides for calculating a factor of seriousness based on the total number of violations which are cited by inspectors depending upon the number of days they have made inspections at a given operator's mine.

If this had not been a consolidated proceeding, I would not have had in the record a computer printout, like Exhibit 1 in this proceeding, to provide the facts showing that Pyro has a history of an excessive number of violations of section 75.400. Since I have emphasized Pyro's unfavorable history of previous violations in this proceeding by having assessed some substantial amounts under the criterion of history of previous violations, I believe that it is possible to approve the parties' settlement under which Pyro has agreed to pay the full penalty of $178 proposed by MSHA for this violation of section 75.400 because the other two penalties assessed for violations of section 75.400 should have the deterrent effect of impressing upon Pyro's management the importance of increasing its efforts to avoid further repetitious violations of section 75.400.

The last violation to be considered is the aforementioned violation of section 75.807 alleged in Citation No. 2338419 which states that a high-voltage cable was not guarded at a substation where miners are required to travel under the cable to get to the breakers on the substation. MSHA considered the violation to have been associated with moderate negligence and gravity because any injury which might have occurred would have been likely to cause lost workdays for one person and proposed a penalty of $98. Pyro has agreed to pay a reduced penalty in this instance of $49.

Exhibit 11 shows that Pyro has been assessed penalties for four previous violations of section 75.807, but three of those, including the most recent one, were not considered to be serious enough to be designated as significant and substantial by the inspector who wrote the citations. I would be inclined to assess at least $20 under the criterion of history of previous violations in this instance if it were not for the fact that the parties' settlement agreement is based on some extenuating circumstances which indicate that some doubt exists as to whether the violation actually occurred.

Section 75.807 provides, in pertinent part, that underground high-voltage cables shall be "guarded where men regularly work or pass under them." The parties agreed to the reduction because the citation is based on a miner's statement to an inspector, rather than on an observation made by the inspector himself. Pyro contends that the violation was cited at a place where miners do not regularly travel or pass. Counsel for MSHA stated that there appears to be merit to Pyro's contention and that a reduction in the proposed penalty is warranted in such mitigating circumstances (Tr. 189). I find that the parties have given a satisfactory reason for reducing the proposed penalty in this instance to $49.

For the aforesaid reasons, the parties' request for approval of their settlement agreement should be granted as hereinafter ordered.

WHEREFORE, it is ordered:

(A) The motion filed on September 3, 1985, by counsel for the Secretary of Labor to strike portions of Pyro Mining Company's brief is denied for the reasons hereinbefore given.

(B) The parties' motion for approval of settlement with respect to the penalties proposed by MSHA in Docket No. KENT 84-238 is granted and the settlement agreement is approved.

(C) Pursuant to the parties' settlement agreement, Pyro Mining Company shall, within 30 days from the date of this decision, pay civil penalties totaling $295.00 which are allocated to the respective alleged violations as follows:

Citation No. 2505113 6/1/84 § 75.523-1	$ 68.00
Citation No. 2505114 6/1/84 § 75.400	178.00
Citation No. 2338419 6/26/84 § 75.807	49.00
Total Settlement Penalties in Docket No. KENT 84-238	$ 295.00

(D) Pyro Mining Company shall, within 30 days from the date of this decision, pay civil penalties totaling $8,260.00 for the violations cited by the inspector in Docket Nos. KENT 84-184 and KENT 84-196 which are allocated to the respective violations as follows:

Docket No. KENT 84-184

Citation No. 2338839 3/23/84 § 75.503	$2,460.00
Citation No. 2338840 3/23/84 § 75.400	2,360.00
Total Penalties in Docket No. KENT 84-184 ...	$4,820.00

Docket No. KENT 84-196

Citation No. 2338838 3/23/84 § 75.308	$1,760.00
Citation No. 2505051 4/18/84 § 75.400	1,680.00
Total Penalties in Docket No. KENT 84-196 ...	$3,440.00
Total Penalties in Contested Dockets in This Proceeding	$8,260.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-17 A.C. No. 05-00469-03548
v.	:	Dutch Creek No. 2 Mine
MID-CONTINENT RESOURCES, INC., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Carlson

This civil penalty proceeding, tried under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the Act), arose out of a federal inspection of the Dutch Creek No. 2 Mine of Mid-Continent Resources, Inc. (Mid-Continent). On September 13, 1984, mine inspector Louis Villegos issued a citation charging that Mid-Continent violated a safeguard issued pursuant to 30 C.F.R. § 75.1403-5(g). 1/

1/ Section 75.1403-5(g) is a "criterion" regulation issued by the Secretary under authority of section 314 of the Act. The statutory section survives from the 1969 Coal Act and provides special enforcement procedures for hazards involving transportation of men and materials. It provides:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Section 75.1403-1(b) sets forth the conditions under which the Secretary's representatives may issue citations for an operator's failure to comply with a safeguard. It provides:

> The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard

The record shows that MSHA inspector Louis Villegos, durin an inspection of Mid-Continent's Dutch Creek No. 2 underground coal mine on September 8, 1983, issued a safeguard because coal sloughage allegedly obstructed a part of the 24 inch travelway one side of the 202 longwall strike belt.

The "condition or practice" portion of the safeguard writt by the inspector reads:

> A clear travelway at least 24 inches wide was not provided on the upper side of the 202 longwall strike belt The location was from the stage loader transfer point and continued outby for a distance of 150 feet.
>
> A clear travelway at least 24 inches wide shall be provided on both sides of all conveyor belts at this mine.

The "action to terminate" portion of the same document was filled in the same day. It reads:

> The travelway was cleaned up of the coal sloughage to provide the travelway.

At a subsequent visit to the mine on September 13, 1984 Inspector Villegos issued a citation under section 104(a) of th Act charging a violation of 30 C.F.R. § 75.1403-5(g). The improper "condition or practice" was described thusly:

> A clear travelway at least 24 inches wide was not provided on the uphill side of the 5th north double entry

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1/ Footnote con't.

> which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice [citation] shall be issued to the operator pursuant to section 104 of the Act.

The inspectors' authority in writing safeguards is circumscribed by the "criteria" regulations which define the limits within which the safeguards may issue. Section 75.1403-5(g), the criterion relied upon in this case, applies t belt conveyors. It provides:

> A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

strike conveyor belt. The lack of clearance was at numerous locations starting 200 feet outby the two air lock doors and inby to the section dump point. The obstructions were timber at 5 inches from the belt, coal sloughage within one foot, and parts of the travelway being through a trench one foot in width.

The Secretary seeks a civil penalty of $119.00 for the violation. The proposed penalty was duly contested by Mid-Continent and was heard on July 19, 1985, at Glenwood Springs, Colorado. Both parties declined to file briefs or other post-hearing submissions; both argued the matter on the record.

REVIEW AND DISCUSSION OF THE EVIDENCE

There is virtually no dispute concerning the pertinent facts. The Secretary offered the testimony of Inspector Villegos. Mid-Continent presented no witnesses.

In its answer to the Secretary's petition proposing penalty Mid-Continent urged that the safeguard should be vacated because 30 C.F.R. § 75.1403-5(g) applies only to conveyors used to transport persons or materials. (It is undisputed that the belts here in question were used exclusively to move coal.) After the filing of the pleadings in this case, however, the Commission ruled that section 75.1403-5(g) applied to conveyors used solely for coal-carrying, as well as those used to transport materials or miners. Jim Walter Resources, Inc., 7 FMSHRC 493 (April 1985); Jim Walter Resources, Inc., 7 FMSHRC 506 (April 1985). Respondent thus no longer questions that its conveyors are covered by the criterion cited by the Secretary.

Mid-Continent now maintains that the safeguard written by Inspector Villegos was not broad enough to cover the subsequent citation, and that the citation is therefore void. For support in this contention Mid-Continent looks to Southern Ohio Coal Company, 7 FMSHRC 509 (April 1985). In that case the Commission noted that the safeguard provisions of the Act confer upon the Secretary "unique authority" to promulgate the equivalent of mandatory safety standards without resort to the formal rule-making procedures demanded elsewhere in the Act. It therefore held that safeguards, unlike ordinary standards, must be strictly construed. The safeguard notice, that is to say, "must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." Fundamental to this concept is the notion that the operator must have clear notice of the conduct required of him.

Mid-Continent's position is best summarized in this statement by counsel:

> Our contention under Southern Ohio is that the safeguard which was originally written was not broad enough to include these specific items. The original safeguard required construction of belts, 24 inch clearance. That was accomplished. The subsequent instructions [sic] were not specifically addressed. Therefore, and properly, the subsequent obstructions have to be themselves the subject matter of a second safeguard. That essentially is our case. (Transcript at 17-18).

As I perceive it then, Mid-Continent's argument is that th underlying safeguard notice mentioned none of the obstructions specified in subsequent citation: timbers, coal sloughage and a trench. Mid-Continent also appears to suggest that the origina safeguard was directed at a failure of the operator to construc the conveyor so as to leave a 24 inch space between the rib and the outer edge of the conveyor.

The information elicited in the testimony of Inspector Villegos, however, gives little support to Mid-Continent's argu ments. He testified that he saw coal sloughage beside the conveyor which reduced the area of clear passage to less than t 24-inches required in 30 C.F.R. § 75.1403-5(g). He maintained that he told this to Mid-Continent's representative at the scen Mr. Elmer Smallwood, to whom he delivered the safeguard. Mr. Smallwood agreed to get two men to clean up the coal, Villegos testified, and the cleanup was done by 11:00 a.m., an hour and half after the safeguard's issuance (Tr. 21-24). Villegos also testified that the coal was his sole concern at the time; he ha no objection to the way the conveyor was constructed.

Villegos was the only witness to testify. I find his representations to be true. They are, among other things, consistent with the abatement notation on the face of the safeguard which declares, "The travelway was cleaned up of the coal sloughage to provide the travelway."

In deciding the scope of the original safeguard I first no that the inspector completed the block on the form desginated "condition or practice" with very broad language which essentially repeats the operative words of 30 C.F.R. § 75.1403-5(g). It names no specific hazards or causes of hazards. Unde Southern Ohio, supra, one must question whether a mere repetiti of a regulatory criterion can, alone, stand as a valid safeguar That question need not be resolved here, however, since I am convinced that Inspector Villegos's safeguard document, read in its entirety, conveyed an unmistakeable picture of the proscrib hazard: an accumulation of coal sloughage which partially obstructed the 24-inch travelway.

safeguard notice should be read in its entirety to determine its proper scope. The "action to terminate" portion of the notice in this case makes clear to any reasonable reader that the hazard was coal sloughage. Moreover, there can be no question that actual misunderstanding of the true aim of the safeguard existed the evidence shows that the sloughage was cleaned up under the direction of a management official who discussed the nature of the notice with the inspector.

Put another way, the Commission's insistence upon a narrow construction of safeguard notices does not require the hyper-technical reading urged by Mid-Continent. In Southern Ohio the Commission recognized as much when it said:

> The requirements of specificity and narrow interpretatic are not a license for the raising or acceptance of purely semantic arguments. . . . We recognize that safeguards are written by inspectors in the field, not by a team of lawyers. (Southern Ohio, supra, N.2 at 521.)

I do, however, accept certain parts of Mid-Continent's argument. Under the Commission's reasoning in Southern Ohio, I am not convinced that either the shallow trench or the timbers in the 24-inch travelway were encompassed within the limits of the underlying notice to provide safeguards. The specification of "coal sloughage" in the original notice was broad enough to embrace the casual presence or accumulation of coal or similar solid objects in the travelway. It was not, however, broad enough to include a wholly dissimilar impediment to travel such as a shallow trench. The trench differed from such solid object in much the same way as accumulated water in Southern Ohio differed from the rocks and construction debris which were covered by the previous safeguard.

The status of the timbers which allegedly impinged on the walkway space is not so clear. Had the timbers been left on the floor to join the coal sloughage as tripping-and-falling hazards they should logically be treated as a "similar" hazard covered b the underlying safeguard. The inspector's testimony, however, indicated that the timbers were not merely a loose impediment lying on the floor. Rather, they were upright timbers installed as a part of the roof control system (Tr. 29). The timbers therefore constituted what may be referred to as an essential part of the underground mine structure. In that sense they represented an abatement problem far different from the mere removal of random obstacles left on the travelway floor. They differed enough from the class of objects akin to coal sloughage to remain outside the reasonable scope of inspector's notice of safeguard.

Consequently, I conclude that the citation issued to Mid-Continent was valid with respect to the coal sloughage, but was invalid with respect to the shallow trenches and timbers. The citation will be affirmed as to the former and vacated as to the latter.

A further matter deserves brief mention. The conveyor referred to in the inspector's notice of safeguard was a different conveyor located in a different part of the mine from the conveyor referred to in the subsequent citation. This difference is of no legal significance. The safeguard issued on September 8, 1983 was directed to "all conveyors in this mine." The evidence shows that both conveyors were of the sort covered by 30 C.F.R. § 75.1403-5(g).

PENALTY

We now turn to the matter of an appropriate civil penalty. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

The parties stipulate that payment of the Secretary's proposed penalty of $119.00 would not impair Mid-Continent's ability to continue in business. They further stipulate that the company produced 743,844 tons in all its operations in 1983, and 463,504 tons in the mine in question. Finally, they stipulate that abatement was prompt. The government presented no evidence concerning Mid-Continent's history of prior violations. Such history must therefore be treated as favorable in this proceeding.

I must conclude that the gravity of the violation was low. The Secretary's original $119.00 penalty proposal was in part predicated upon the presumed hazards presented by the upright timbers and the shallow trenches in the travelway. These hazards cannot be considered in the present penalty, however, since they were outside the reach of the safeguard notice. More important, however, the exposure of miners to the established hazard - coal sloughage - was quite low. The inspector's testimony revealed that miners would seldom use the travelway next to the conveyor; their presence would tend to be limited to inspections of or maintenance on the conveyor itself.

Considering all these elements, I conclude that the proposed $119.00 is excessive. I hold that a civil penalty of $40.00 is reasonable.

CONCLUSIONS OF LAW

Upon the entire record herein, and consistent with the findings contained in the narrative portion of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to decide this case.

(2) Mid-Continent violated the safeguard issued on September 8, 1983 under 30 C.F.R. § 75.1403-5(g) as charged in that part of the citation alleging an unlawful accumulation of coal sloughage within the 24-inch-wide travel space required to be maintained next to the 5th north double entry strike conveyor belt.

(3) Mid-Continent did not violate the safeguard with respect to the presence of timbers or trenches as alleged in the citation because such hazards or conditions were not within the scope of the safeguard.

(4) A civil penalty of $40.00 is appropriate for the violation established.

ORDER

Accordingly, the citation, as modified in this decision, is ORDERED affirmed; and Mid-Continent is ORDERED to pay a civil penalty of $40.00 within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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1985

ROCCO CURCIO, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 84-208-D
v.	:	
	:	Emilie No. 1 Mine
KEYSTONE COAL MINING CORPORATION, Respondent	:	

DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, D.C., for Complainant; William M. Darr, Esq., Indiana, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discriminated against in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act) when he was charged with an unexcused absence from work for the time he spent in discussing a safety problem at the subject mine with international union officials. He does not seek monetary relief, but requests that the unexcused absence be removed from his employment record, and that he be reimbursed for the costs and expenses, including attorney's fees, incurred in connection with this proceeding. Respondent contends that it was merely enforcing its absentee policy in a nondiscriminatory fashion in assessing an unexcused absence against Complainant.

The case was heard in Pittsburgh, Pennsylvania on December 14, 1984. Rocco Curcio and Jerry Duncan testified on behalf of Complainant. Anthony Poloff, James E. Clinger and Edward J. Onuscheck testified on behalf of Respondent. Counsel for both parties requested that post hearing briefs be delayed so that they could be filed in conjunction with briefs due in a subsequent case (Donald C. Beatty, Jr. v. Helvetia Coal Company), involving the same counsel, and the same or similar issues. Since back pay is not an issue, I granted the request. Post hearing briefs were filed by both parties on August 2, 1985.

FINDINGS OF FACT

The important facts in this case are not in dispute. Respondent was at all times pertinent to this proceeding the owner and operator of the Emilie No. 1 Mine, an underground mine in Pennsylvania. Complainant was a miner at the subject mine, a member of the United Mine Workers of America local at the mine, and an elected member of the Safety Committee.

On February 9, 1984, Complainant and fellow-safety committee member Jerry Duncan talked to Mine Foreman Tony Poloff about dusty conditions on the jeep road at 11 butt, first left section in the subject mine. The road was used to transport miners in a jeep and a skid from the track to the working section. Complainant and Duncan suggested that calcium should be put on the road to reduce the dust. Poloff said he would take care of it. The condition was not corrected, and Complainant and Duncan again told Poloff about the problem, but as of February 24, 1984, it had not been taken care of.

On April 9, 1982, Mine Superintendent J. E. Clinger issued what has been termed in this proceeding Respondent's absence control program. The document stated that an employee's absence would not be excused when it "is in the power of the employee to overcome, change, prevent, or arrange otherwise . . .". The document does not specifically refer to absences on union business, or absences due to safety complaints.

On February 22, 1984, a mine communication committee meeting was held at the subject mine. This was one of regularly scheduled meetings between management and labor designed to discuss changes in company policy, employee complaints, accidents, employee illness and absences, and other matters. The February 22 meeting was attended by Mine Foreman Anthony Poloff, Superintendent James Clinger, Cleaning Plant Foreman Dan Shafer and the three committeemen of the Emilie Mine, Jerry Duncan, Rocco Curcio and James Bonelli, and the committeeman at the cleaning plant, Guy Bonelli. The employee representatives inquired about two employees with claims for excused absences to which management representatives replied. The Superintendent told the committee "on trips to Ebensburg, I wouldn't except [sic] anymore slips for excused absents [sic] -- they would have to take a 'contract day'." "Trips to Ebensburg" referred to trips to Union headquarters on union business. The committee men were told that if they lost time from work they would have to take contract days (personal days, graduated vacation

days or sick days under the Union contract), or, with the prior permission of the Superintendent, they could change shifts. The union committee personnel told management that they did not agree with what they construed as a change in policy. Complainant had been a commiteeman (both mine committee and safety committee) since February 7, 1983. He missed days from work on April 3, 1983, June 8, 1983, June 22, 1983, August 4, 1983 and August 9, 1983 because of meetings at Union headquarters in Ebensburg, Pennsylvania discussing safety issues. In each instance he received an excused absence. In each instance, Complainant had been told in advance that he would be charged with an unexcused absence (an "A" day), but in fact he was excused (received a "B" day).

On February 24, 1984, Complainant arrived at the mine at about 7:35 a.m. He was scheduled to work the daylight shift (8:01 a.m. to 4:00 p.m.) as a beltman. Jerry Duncan came out of the mine a short time later and was angry because Respondent had not corrected the dust problem on the jeep road. Complainant and Duncan discussed the matter and decided it would be best to seek the advice of the union district officials since talking with management had proved fruitless. Complainant told his shift boss, Joe Eckman that he was going to Ebensburg on Union business. Then he and Duncan told Tony Poloff the same thing. Poloff replied that he would have to take an "A" day. Complainant did not specifically tell Poloff the nature of the union business he intended to take up at Ebensburg.

At Ebensburg, Complainant and the other committee members met with District UMWA President Paul Gormish, and Vice President Nick Molnar. After a discussion it was agreed that the safety committee should request a 103(g) inspection by MSHA of the dusty area. On February 24, 1984 a written request for an MSHA inspection of the travel road, first left section, 1 butt, 11 South section and 11 butt was prepared and signed by James Bonelli, Chairman of the Safety Committee. It was delivered to the MSHA office by Bonelli and Complainant. As a result of the request, an inspection was conducted on February 28, 1984. A citation was issued on that date charging a violation of the approved ventilation, methane and dust control plan because of excessively dry and dusty haulage roads -- the haulage road from the end of the track in 1 left, in 1 butt, 11 South section, a distance of about 2500 feet; and from the end of the track at 1 left in 11 butt off 1 left, a distance of about 2000 feet. The citation was extended following an inspection on February 20, 1984 and was terminated on March 7, 1984 after a wetting

agent to allay the dust was applied to the affected haulage roads.

When Complainant returned to the mine after the Ebensburg meeting, he took a letter from the UMWA District Vice President asking that Complainant be excused from work on February 24, 1984 because he was in the District office on union business. Respondent, however, charged Complainant with an unexcused absence.

Article XXII of the National Bituminous Coal Wage Agreement of 1981, in effect at Respondent's mine during the time relevant to this case, provides in part that if an employee accumulates 6 single days of unexcused absence in a 180-day period or 3 single days of absence in 30-day period, he shall be designated an "irregular worker" and will be subject to discipline. When an employee absents himself from work for 2 consecutive days without the consent of the employer, other than because of proven sickenss, he may be discharged. Article IX of the contract provides that an employee is entitled to 5 days absence per year for sickness, accident, emergency or personal business. Each employee is also entitled to a graduated vacation of up to 13 days per year depending on his or her length of continuous employment (Art. XIV).

Bonelli took a graduated vacation day on February 24, 1984 and Duncan did not miss time from work since he was on the midnight shift. Only Complainant received an unexcused absence for the day.

ISSUES

1. Did Complainant's trip to Ebensburg, and his absence from work constitute activity protected under the Mine Act?

2. If so, was the action of Respondent charging Complainant with an unexcused absence, adverse action for such protected activity?

3. If so, to what relief is Complainant entitled?

CONCLUSIONS OF LAW

Complainant and Respondent are subject to and protected by section 105 of the Act, the former as a miner and a representative of miners, the latter as a mine operator.

PROTECTED ACTIVITY

In a case under the 1969 Coal Act, the Commission recognized the special status of a union safety committee member in bringing safety complaints to the Secretary. Local 1110 UMWA and Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979). The Commission found that the committee member's leaving work to call a Federal Mine inspector without the employer's permission was protected activity, and that the resulting discipline imposed by the company violated the Act. The 1977 Mine Act was intended to broaden and strengthen the protection aganst discrimination afforded miners and their representatives. See S. Rep. No. 95-181, 95th Cong., 1st Sess. 35-36 (1977), reprinted in Senate Subcommitee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623-624 (1978). Cases under the Mine Act involving safety committee members include Secretary/Mataleska v. Shannopin Mining Company, 4 FMSHRC 2114 (1982) (ALJ) and Secretary/Duty v. Rebel Coal Company, 7 FMSHRC 125 (1985) (ALJ). Both of these cases involved safety committee members who left the job site to investigate or discuss safety problems. In both cases such action was held to be protected activity.

The members of the mine safety Committee are given a special status and added reponsibilities under the Union Contract (Article III(d)) and under the Act. They are the spokesmen for the miners in safety matters and are responsible for bringing safety concerns to management and to MSHA. Subject to the requirements that their actions be taken in good faith and be reasonable, I conclude that the actions of safety committeemen in bringing safety complaints to MSHA or to the mine operator, or in discussing them with union officials is protected activity. The evidence in the case establishes that the trip to Union Headquarters was taken in good faith to discuss a perceived safety hazard, and that it was a reasonable reaction to that perceived hazard. It was related directly to the filing of a section 103(g) complaint and a citation. I further conclude that these activities may not be penalized even if they result in time lost from work by the committeemen.

ADVERSE ACTION

Respondent contends that the adverse action complained of here is de minimis. I disagree. The policy followed by Respondent could result in discharge, and certainly tends to inhibit or discourage the committeeman from bringing safety

complaints to the union or to MSHA. The penalty -- one day's unexcused absence -- is not great, but it is real. I conclude that it is adverse action under the Mine Act. See Lund v. Anamax Mining Company, 4 FMSHRC 249 (1982) (ALJ).

There is no dispute that the activity which I have found to be protected resulted in the action which I have found to be adverse. Therefore, I conclude that Respondent violated section 105(c) of the Act.

RELIEF

THEREFORE, IT IS ORDERED:

1. The unexcused absence assessed against claimant on February 24, 1984 shall be removed from his employment record, and his absence from work on that day shall be deemed excused.

2. Respondent shall cease and desist from enforcing its absentee program against safety committee members in a manner that limits their reasonably bringing safety complaints to management, union or government officials in good faith.

3. Respondent shall pay the costs and expenses (including attorney's fees) reasonably incurred by Complainant in conection with the institution and prosecution of this proceeding.

4. Counsel are directed to confer and attempt to agree on the amount due under paragraph 3 above, and if they can agree, to submit a statement thereof to me within 30 days of the date of this decision. If they cannot agree, Complainant shall within 30 days of the date of this decision, file a detailed statement of the amount claimed, and Respondent shall submit a reply thereto within 20 days thereafter. This decision shall not be final until I have issued a supplemental decision on the amount due under paragraph 3.

5. Respondent shall post a copy of this decision on a bulletin board at the subject mine which is available to all employees, and it shall remain there for a period of at least 60 days.

James A. Broderick

James A. Broderick
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 85-42 A.C. No. 01-01247-03631
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
Harold D. Rice, Esq., and R. Stanley Morrow, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation by Respondent of its approved ventilation plan and therefore of 30 C.F.R. § 75.316. Pursuant to notice the case was heard in Birmingham, Alabama on June 18, 1985. Terry Gaither and William H. Meadows testified on behalf of the Secretary. Eddie Nicholson and John Stephenson testified on behalf of the Operator. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

1. Respondent is the owner and operator of an underground coal mine in Tuscaloosa County, Alabama, known as the No. 4 Mine.

2. The subject mine has been classified as a gassy mine. It liberates almost 30 million cubic feet of methane in a 24 hour period. The face liberation of methane while cutting is in excess of 400 cubic feet a minute. The mine has been described as one of the more gassy coal mines in the country:

"It would rate in the top 10 percent." (Tr. 69) It is a deep mine: the shaft is approximately 2000 feet deep.

3. The approved ventilation, methane and dust control plan was changed in 1972 for Respondent's mines to include the following language:

> Line brattice shall be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times except while roof bolting and servicing as stated in the plan.

This language was included in the plan which was in effect for the subject mine since it was opened, and was in effect in November 1984.

4. On November 13, 1984, Federal Coal Mine Inspector Terry Gaither issued a citation charging a violation of 30 C.F.R. § 75.316 because the line brattice in the No. 3 entry on the No. 4 section was 15 feet outby the entry face.

5. On November 13, 1984, four entries were being driven in the section in question. The No. 3 and 4 entries, and perhaps all four entries, had been driven beyond the point where a crosscut right (between entries 3 and 4) was begun. The line curtain was within ten feet of the face in the crosscut right (it was approximately 5 feet from the face when the citation was issued); however the line curtain in the No. 3 entry was fifteen feet from the face. Mining was not being performed in either the entry or the crosscut at the time the citation was issued, but it had been most recently done in the crosscut right.

6. A methane test was taken in the corner of the No. 3 entry before the citation was issued. It showed less than 1 percent methane.

7. Mining had last been performed in the No. 3 entry on the day prior to the issuance of the citation.

8. Before mining would be resumed in the No. 3 entry, the crosscut right would have to be completed to the yield pillar and the crosscut left would have to be turned and completed. This would normally take 2 to 3 days.

9. Prior to 1984, no citations were issued at the subject mine for alleged violations similar to the one involved here -- that is, for failure to maintain line

brattice to within 10 feet of an entry face, after a crossc
was turned.

REGULATORY PROVISIONS

30 C.F.R. § 75.316 provides as follows:

> § 75.316 Ventilation system and methane and dust control plan.
>
> [STATUTORY PROVISIONS]
>
> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

30 C.F.R. § 75.2(g) provides as follows:

> (g)(1) "Working face" means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle,
>
> (2) "Working place" means the area of a coal mine inby the last open crosscut,
>
> (3) "Working section" means all areas of the coal mine from the loading point of the section to and including the working faces,
>
> (4) "Active workings" means any place in a coal mine where miners are normally required to work or travel;

30 C.F.R. § 75.302-1(a) provides as follows:

> (a) Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded and other working faces so designated by the Coal Mine Safety Manager, in the approved ventilation plan, shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless a greater distance is approved by the Coal Mine Safety District Manager of the area in which the mine is located.

ISSUE

Whether Respondent is obliged to maintain line curtain within 10 feet of all faces, or only the face from which coal is being extracted or was most recently extracted?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. Section 75.316 of Title 30 C.F.R. requires that a mine operator adopt and have approved a ventilation system and methane and dust control plan suitable to the conditions and the mining system of the coal mine. When such a plan has been adopted and approved, the section requires the operator to comply with its provisions. Mid-Continent Coal and Coke Company, 3 FMSHRC 2502 (1981).

3. The approved ventilation, methane and dust control plan in effect at the subject mine on November 13, 1984 required that line curtains be maintained within 10 feet of all faces in all working places. A "coal face" is defined in A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968) as

> a. The mining face from which coal is extracted by longwall, room, or narrow stall system. Nelson. b. A working place in a colliery where coal is hewn, won, got, gotten from the exposed face of a seam by face workers. Pryor, 3.

This definition obviously is not limited to the time during which coal is actually being extracted. It includes working faces as well as faces from which coal has been or will be extracted. The language of the approved plan is all inclusive and clearly includes entry No. 3 cited in this case. The obvious purpose of the changes made in 1972 was to go beyond the requirement of 30 C.F.R. § 75.302-1(a) that line brattice be installed no more than 10 feet from active working faces. All faces, including idle faces, are covered by the plan. The reason for their inclusions is the unusually high methane liberation in the mine. Respondent argues that the requirement is onerous and that it has not been enforced by MSHA prior to 1984. Neither of these arguments can affect the interpretation of the wording of the plan, and I reject them.

4. I conclude that Respondent was in violation of its approved ventilation, methane and dust control plan on November 13, 1984 in failing to maintain line curtain within 10 feet of the face in entry No. 3 on the No. 4 section in the subject mine. The violation was abated in good faith.

5. Respondent is a medium sized operator and has an average history of prior violations. The impositon of a penalty will have no affect on Respondent's ability to contiue in business.

6. I conclude that the violation cited was moderately serious. I am unable to conclude from the evidence whether the violation resulted from Respondent's negligence. Therefore, I conclude that it did not.

7. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $100.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay the sum of $100 within 30 days of the date of this decision as a civil penalty for the violation found herein.

James A. Broderick

James A. Broderick
Administrative Law Judge

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KENNETH W. HALL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 85-8-D
v.	:	MSHA Case No. NORT CD 85-4
CLINCHFIELD COAL COMPANY, Respondent	:	McClure No. 1 Mine

DECISION

Appearances: Kenneth W. Hall, Castlewood, Virginia, pro se; Louis Dene, Esq., Abingdon, Virginia, for Respondent; James Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, appeared specially for the Secretary of Labor.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant filed a complaint with the Commission under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the Act) alleging that (1) his request for a transfer to an above-ground job was ignored, (2) his insurance was stopped, and (3) he was suspended and ultimately discharged, all because he refused to comply with his employer's order to violate a federal law concerning the distance a line curtain was to be maintained from the coal face.

Respondent filed a Motion to Dismiss on the grounds that the complaint was not timely filed, and that it did not state a cause of action under the Act. The motion was denied by order issued April 3, 1985.

Pursuant to notice, the case was heard in Abingdon, Virginia on May 29, 30, and 31, 1985. Jerry Yates, Jr., Billie L. Williams, Eugene McCoy, Ronnie Dean Deel, Ray Boggs, Jeffrey H. Greear, Roy Glovier, and Kenneth W. Hall, testified on behalf of Complainant; Thomas Asbury,

Richard Light, Michael Wright, Wayne Fields, Henry Kiser, and Joseph Pendergast testified on behalf of Respondent.

The Secretary of Labor appeared specially on behalf of Ronald W. Franks, Vearl R. Hileman, Gary L. Roberts, Gerald E. Sloce, Donnie H. Stallard, Joseph R. Tankersley and Frank Young, all employees of the Mine Safety and Health Administration who had been subpoenaed on behalf of Respondent, and moved that the subpoenas be quashed.

The motion was argued on the record and the Secretary filed a memorandum of law. I granted the motion to quash on the ground that the testimony which might be elicited from the subpoenaed inspectors and investigator would not be helpful in deciding the issues before me in this case.

Both parties filed post hearing briefs following the close of the record. I have carefully considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

Respondent is the owner and operator of an underground coal mine in Dickenson County, Virginia known as the McClure No. 1 Mine. The mine is a shaft mine and was opened in 1977. At all times pertinent to this proceeding, the mine height was approximately 5½ feet, with the exception of one section where it varied from 4 to 7 feet. The mine was classified as a gassy mine, and liberated substantial amounts of methane, primarily from the coal faces.

The coal is extracted by continuous mining and long wall mining. The continuous mining operations are used to cut panels for the long wall operations. The coal is removed from the mine by belt haulage.

When the mine was opened, the working sections were ventilated by auxiliary fans and tubing installed on the row of bolts next to the rib and which was advanced by a "slider" as the miner cut in the coal face. There was sufficient height in the coal seam to permit travelling under the tubing. When the coal height declined in 1982 to the point where the machinery could not operate under the tubing, the method of ventilation was changed and line curtains were used. The procedure followed thereafter is as follows: After the coal is cut, the roof bolters come to the face area. They first install a bolt approximately 3 feet from the rib. When the rib bolt is being installed, the curtain is removed to the last row of permanent supports because the roof bolting

machine canopy would otherwise force the curtain into the rib and cut off the ventilation to the face. After the rib bolt is installed the line curtain is advanced to this bolt and the center bolts are installed. Thus, in the case of cuts exceeding 10 feet, during the installation of the rib bolt, the curtain is not maintained to within 10 feet of the face. Prior to March 6, 1984, the approved ventilation plan required that the line curtain be maintained to within 10 feet of the face while bolts were installed. On March 5, 1984, Respondent requested a revision of the plan to permit it to remove the curtain to the last row of permanent supports while the rib bolt is being installed. The revision was approved by the Mine Safety and Health Administration on March 6, 1984.

Complainant began working in the coal mining industry from September 1971 when he was hired by Respondent as a roof bolter and utility man. He worked for other coal companies from April 1973 until March or April 1979. He was certified by the State of Virginia as a qualified mine foreman in 1976 and worked as a section foreman for Big Ten Coal Company for about a year in 1978. He also worked as a mine foreman for United Castle Coal Company from October 1978 to March or April 1979. He was rehired by Respondent in September 1981 as a section foreman, and was placed in charge of a production crew, using a continuous miner. Shortly after he began working, he questioned the General Foreman about the practice of removing the line curtain while bolting, and was told that the company had permission to do it. Complainant's crew followed the bolting procedure outlined above.

In June 1983 an explosion occurred at the subject mine as a result of which Complainant's brother was killed. Complainant did not return to work following the explosion until August 1983. In the interim he was treated at a psychiatric clinic. On January 9, 1984, Complainant sustained a back injury at work and was off work until approximately February 19, 1984.

After he returned to work in February 1984, at least three roof bolters expressed concern to Complainant about the practice followed in removing the curtain from the jack when putting up the first row of bolts. Apparently bolters had complained to Complainant and to other foremen about this practice for some time before that. Complainant asked the day shift General Mine Foreman, Johnny Kiser, about the practice and was told that the company had permission to do it. He also questioned two MSHA inspectors, Joe Tankersley and Mr. Hileman, the first of whom said the practice was legal and the second that it was not legal.

A few days after he spoke to Kiser, Complainant and the other owl shift foremen were called in to the office of the company safety inspector Wayne Fields. The meeting was called at the request of an MSHA Inspector who told Fields that roof bolters and section foremen had raised questions about the roof bolting procedure being followed in the mine. The Inspector asked Fields to instruct the men not to ask questions about the procedure in the presence of an inspector until the ventilation plan could be modified. Fields told the foremen not to raise the issue or discuss it with union personnel in the presence of a Federal Inspector. He also instructed them to continue bolting in the usual manner. Complainant, however, shortened his cuts to ten feet in order to avoid what he considered an illegal procedure. As I stated above, the company sought a revision of the plan on March 5, 1984, and MSHA approved the revision on March 6, 1984.

About March 1, 1984, the shift prior to Complainant's had left an 18 feet deep cut, and Complainant's bolting crew refused to bolt it, because it was too deep. Complainant called Mike Wright, the General Mine foreman, who came to the area and persuaded the bolters to bolt the place.

March 2, 1984 was the last day Complainant worked at the subject mine. He left work because of anxiety, hyperventilation and other associated emotional problems. He told Richard Light, Mine Superintendent, that he could not function as a mine foreman because of his emotional problems and that he intended to consult a psychiatrist. Complainant testified that he told Light that he was afraid of being sent to jail if someone were hurt or killed because Complainant ordered him to violate the law concerning the roof bolting procedure. Light testified that Complainant briefly mentioned the roof bolting procedure being followed but denied that he related his emotional problems to that situation. Whatever the exact conversation between the men, I find that Complainant was concerned about the procedure being followed which he felt was violative of the Mine Safety law--why else would he have brought the matter up with Light at that time?--and that he claimed that he could not work in part because of that situation. Light did not talk to Complainant thereafter until the complaint involved here was filed with MSHA.

Complainant was treated by a psychiatric social worker who recommended that he discontinue underground work. Thereafter, he recontacted Henry Kiser, Vice President and Joseph Pendergast, Head of Industrial Relations seeking a

transfer to an above ground job. He was told that no such jobs were available. He continued on salary until April 22, 1984, and then received disability insurance benefits until about June, 1984. In June he applied for workers compensation which was denied after a hearing before a State Deputy Commissioner.

He unsuccessfully sought other nonmining jobs in Southwest Virginia, and in August 1984 began working as a school custodian in Broken Arrow, Oklahoma, at a wage of $6.04 per hour. When he left Respondent he was earning $1370 every two weeks.

On September 30, 1984, he returned to Virginia because of inability to support his family on the wages he was earning as a custodian. He again sought an above ground job from Respondent but received no response. In November 1984 he received a letter from Respondent informing him that he was terminated because he took a job in Oklahoma. There is substantial conflict in the evidence on the issue whether Complainant told mine management of his concern over the legality and safety of the bolting procedure--specifically the practice of removing the line curtain when installing the first row of bolts. I find as a fact that he did tell Richard Light the mine Superintendent of his concern. I further find that his expression of concern was a reasonable one and was made in good faith.

ISSUES

1. Whether Complainant has established that he was engaged in activity protected by the Act.

2. If so, whether Complainant suffered adverse action as a result of the protected activity.

3. If so, to what relief is he entitled.

CONCLUSIONS OF LAW

Complainant and Respondent are protected by and subject to the provisions of the Act, Complainant as a miner, and Respondent as the operator of the McClure No. 1 Mine.

In order to establish a prima facie case of discrimination under the Act, the miner has the burden of showing (1) that he engaged in protected activity and (2) that he was subject to adverse action which was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other

grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984). The mine operator may rebut the prima facie case by showing that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity.

PROTECTED ACTIVITY

The evidence establishes that Complainant was engaged in activity protected by the Act: I have found that he questioned the General Foreman about the practice followed at the subject mine of removing the line curtain while bolting the roof. This apparently occurred a short time after he began working as a section foreman and again after he returned to work in February 1984. Complainant also questioned two MSHA inspectors about the practice and was told by one that it was illegal. After the meeting with company Safety Inspector Fields, Complainant shortened his cuts to avoid having his crew perform what he believed was an illegal procedure. Complainant told General Superintendent Light that he could not continue working as a foreman in part because of his concern that the procedure being followed was illegal. I conclude that all of these activities were safety related and are protected by the Act.

NONPROTECTED ACTIVITIES

Not protected by the Act were Complainant's moving to Oklahoma, and his emotional problems and psychiatric treatment. The emotional problems were caused in part by Complainant's understandable reaction to his brother's death, but I conclude that Complainant has not established that they were related to safety factors connected with his employment. Specifically, I conclude that they were not the result of his being "order[ed] to willfully violate Federal Law."

ADVERSE ACTION

Complainant complains of three separate adverse acts by the company:

(1) the denial of vacation pay, and insurance benefits;

(2) the refusal of Respondent to grant his request for a transfer to an above ground job;

(3) his discharge from employment.

I conclude that each of these acts was an adverse action.

MOTIVATION

1. Complainant's disability insurance payments were discontinued on the ground that he could not establish disability and had been working in Oklahoma. The termination of benefits was effected by the insurance carrier, and not by Respondent. There is no evidence in the record linking the termination of these benefits to Complainant's safety complaints or any other protected activity. The evidence in fact shows that the insurance payments were stopped because the insurance company determined that Complainant was no longer totally disabled. Complainant alleged that he did not received vacation pay to which he was entitled after March 1984 in accordance with his employment contract. Again, there is no evidence in the record that the denial of vacation pay was motivated in any part by Complainant's protected activity.

2. Complainant testified that he requested a transfer to an outside job when he talked to Joseph Pendergast, Industrial Relations Manager, at the end of March 1984. Pendergast denied that there was any discussion of a transfer to an outside job. In any event, there is no evidence that in March 1984, Pendergast had any knowledge of Complainant's safety concerns. There is no evidence in the record that Respondent refused to transfer Complainant because he was ordered by his superiors to mine in an illegal manner.

3. In November 1984, Pendergast was notified by the Insurance Department of Respondent that Complainant's workers' compensation and insurance benefits had been denied, and that Complainant was working somewhere in Oklahoma. Based on this information, Pendergast wrote Complainant on November 7, 1984 notifying him that his employment "has been terminated as of your last day worked as a voluntary resignation to accept another position." Pendergast testified that he did not clear or discuss with Mr. Light, Mr. Fields, Mr. Wright or anyone in the Safety Department, his decision to terminate Complainant. Pendergast further testified that he had no knowledge of Complainant's contention that he was ordered to violate MSHA regulations in the roof bolting and ventilation procedures he was following. I accept the testimony of Pendergast on these two matters. Therefore, whether the termination was voluntary or forced, there is no evidence that it was motivated in any part by activity protected under the Mine Act.

4. Whether Respondent treated Complainant unfairly in refusing his request for a transfer; whether it sufficiently considered his emotional problems; whether it violated company policy in failing to honor Complainant's vacation pay request, are not issues before me in this case. My jurisdiction is limited to considering whether Respondent disciplined Complainant for activity protected under the Mine Safety Act. I conclude that the evidence before me establishes that it did not.

5. Therefore, I conclude that Complainant has failed to establish a prima facie case of discrimination under the Act.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that this proceeding is DISMISSED.

James A Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-150-M A.C. No. 04-04700-05501
v.	:	Digmore Placer Mine
C. D. LIVINGSTON, Respondent	:	

DECISION

Appearances: Carol Fickenscher, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Mr. C.D. Livingston, Iowa Hill, California, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a provision of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., ("the Act").

After notice to the parties, a hearing on the merits was held in Sacramento, California on March 19, 1985.

The parties filed post-trial briefs.

Citation 2363602

This citation alleges respondent violated Section 103(a) of the Act which, in its pertinent portions, provides as follows:

> Sec. 103.(a) Authorized representatives of the Secretary shall make frequent inspections and investigations in coal or other mines each year for the purpose of ... (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that . . . In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its

entirety at least four times a year, and of each surfac coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including inspections of mines based on criteria including, b not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, . . . with respect to fulfilling his responsibilities under this Act, or any authorized representative o the Secretary, . . . shall have a right of entry to, upon, or through any coal or other mine.

Issues

The issues are whether respondent, a one man operator of a underground gold mine, is subject to the Act.

If so, did respondent violate the Act in refusing entry to the MSHA inspector. If the Act was violated, what penalty is appropriate?

Summary of the Evidence

MSHA Inspector Esteban visited the Digmore Placer Mine on May 17, 1984.

At the time Mr. Livingston was doing some work around the mine portal. He told the inspector that MSHA had no jurisdicti over the mine. However, he agreed to a courtesy (CAV) inspecti The inspector on that occasion found four conditions that violated the regulations. He issued notices for the violations He also issued one citation when he found a situation involving condition of imminent danger. This arose because a gasoline driven loader was being used underground. Carbon monoxide poisoning can occur in these circumstances (Tr. 7-9).

The inspector returned June 21, 1984 to abate the previous citation and to conduct a regular inspection. On that occasion Mr. Livingston repeated his statement that MSHA lacked jurisdiction over the mine. He further told the inspector that he should have a search warrant together with the sheriff with him (Tr. 10). The inspector then stated that he would issue an orc for denial of entry and he issued a citation under Section 104 and 107(a) of the Act. When Mr. Livingston refused to accept t citation the inspector mailed it to him (Tr. 10).

Ronald Stockman and Don Robinson testified for respondent Mr. Stockman, a miner, indicated that Mr. Livingston has no employees but he (Stockman) has been "helping out" since 1984. Further, he was in the mine about the same time as when the

they were free to come and go. It was further the opinion of the witness that a small operator is not subject to the Act (Tr. 25, 26, 30).

In Stockman's view Mr. Livingston is a professional miner who is concerned about safety (Tr. 31).

Don Robinson testified that he has not worked at the Livingston mine. But he came down to visit on a Sunday and he asked if he could help move some dirt. Miners, in such circumstances that occurred here, help each other (Tr. 32, 33).

Mr. Livingston indicated that his son did not work at the mine in May or June 1984 (Tr. 37).

Discussion

The evidence is insufficient in this case to establish that C.D. Livingston employed miners at the Digmore Placer mine at the time this citation was issued in June, 1984.

However, Inspector Esteban indicated that Mr. Livingston himself was doing some work around the portal of the mine at the time of an inspection in May, 1984 (Tr. 8).

When he returned after the courtesy inspection he was denied entry to the premises.

Thus, the ultimate issue presented for consideration here is whether a one man underground gold mining operation is subject to the Act. On this point the parties have filed extensive briefs.

It is clear that since its passage the present Act has been broadly construed. In Cypress Industrial Minerals Corp., 3 FMSHRC 1 (1981) the Commission ruled that: "The Act provides an expansive definition of a 'mine' which Congress stated must be given the 'broadest possible interpretation', with doubts resolved in favor of inclusion," 3 FMSHRC at 2. In El Paso Rock Quarry, Inc., 1 FMSHRC 2046, 3 FMSHRC 673 (1981), it was held that customers and employees of customers who did not comply with standards on mine property are "miners" within the meaning of the Act. Further, the operator was held liable for their failure to comply.

Respondent's factual defense rests on the proposition that he has no employees and, therefore, he is not subject to the Act. However, the failure to have employees was rejected as a defense by the Sixth Circuit in Marshall v. Sink, 614 F.2d 37 (1980). Specifically, the Court observed that, 614 F.2d at 37:

> Sink owns and operates without employees a small mine in West Virginia. When federal coal mine inspectors

> attempted to make a routine inspection of Sink's mine pursuant to 30 U.S.C. § 813, Sink refused entry. (Emphasis added).

The Court, citing several cases, noted that "it is settl that Sink's mine is subject to federal regulation" 614 F.2d a 38.

It is true that Sink operated a coal mine whereas respondent operates an underground gold mine. But the MSHA regulations are nevertheless applicable here, particularly in view of the broad Congressional definition of a mine. This i apparent when the Congress enacted this definition:

> (h)(1) 'coal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form . 30 U.S.C. 802(3).

Respondent's post-trial brief raises many issues. Respondent initially asserts that MSHA has applied a harsh in pretation of the Act without taking into consideration the tr intent of Congress. Respondent claims the true intent of Congress was to exclude small operators such as himself.

I disagree. The Congressional intent is clear and convincing. The Senate Committee, which was largely responsi for drafting in final mine safety legislation, stated as foll

> The Committee notes that there may be a need to resol jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusi of a facility within the coverage of the Act.
>
> See S. Rep. No. 181, 95th Congress., 1st Sess. 14 (1977), reprinted in Senate Sub-Committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 "Legis. Hist."

Respondent further argues the substantial differences between coal and gold mining render MSHA without jurisdiction

Contrary to respondent's assertion the legislative histo clearly shows the Congressional concern and review of the injuries and diseases affecting the broad spectrum of the min industry. Legis. Hist. at 366, 595, 645.

Respondent's brief also states that the actual facts are that he was in the process of prospecting and had not yet beg to operate any mine.

Respondent did not testify on this subject. The only evidence, from Inspector Esteban, establishes that Mr. Livingsto on May 17, 1984 was doing some work around the portal of the min (Tr. 8). In addition, on June 21, 1984 when the inspector re- turned, Mr. Livingston was operating his mill (Tr. 10).

If engaged in milling activities respondent would clearly b within the statutory definition of a "coal or other mine". This is apparent because the plain words of the statutory definition state, in part, that a "coal or other mine" includes the "milling of such minerals" 30 U.S.C. § 802 (3)(h)(1).

But to address issue raised by respondent in his brief: mer exploration by using a loader underground can constitute mining under the Act. This analysis is in line with the definition of exploration contained in A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior, Bureau of Mines (1968). The definition states as follows:

> Exploration. a. The search for coal, mineral, or ore by (1) geological surveys; (2) geo-physical prospecting (may be ground, aerial, or both); (3) boreholes and tria pits; or (4) surface or underground headings, drifts, or tunnels. Exploration aims at locating the presence of economic deposits and establishing their nature, shape, and grade and the investigation may be divided into (1) preliminary and (2) final. See also preliminary ex- ploration. Also called prospecting. Nelson. b. Work in- volved in gaining a knowledge of the size, shape, position, and value of an ore body. Lewis, p. 20. c. A mode of acquiring rights to mining claims. Fay.

Respondent further states that if MSHA's position is sustained as to exploration then they will have to conduct inspections on those gold miners who are panning, suction dredging or mining recreationally. The facts here involve underground mining exploration activities, as noted. It is not necessary in this case to rule on respondent's hypothetical factual situations.

Respondent also argues that the doctrine authorizing warrantless searches does not apply here Cf. Donovan v. Dewey, 101 S. Ct. 2534 (1981). He contends that the mine in the cited case was commercial property whereas in this situation his residence was located on the property inspected by MSHA.

The purpose of the hearing was for all parties to present their evidence. There is some evidence that respondent's office was located in his home. But, it was not shown that respondent's home or office were searched in any manner. It is not possible to apply constitutional principles in a factual vacuum. I, accordingly, reject respondent's warrantless search arguments.

Supp. 797 (1973).

It is true that the above cited cases hold that the Act is not applicable to a small owner operated mine.

However, both Wait and Bloom stand virtually alone. Compar the better reasoned decisions of Marshall v. Standt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979); Marshall v. Sink, supra; Marshall v. Texoline Co., 612 F.2d 935 (5th Cir. 1980); Marshall v. Nolichuckey Sand Co., Inc., 606 F.2d 693 (6th Cir. 1979), cert denied ___ U.S. ___ 100 S. Ct. 1835.

The Review Commission has the obligation to establish a national policy as to the scope of the Federal Mine Safety Act. As one of the judges of the Commission the writer is obliged to follow Commission precedent. Accordingly, I reject the pronouncements of the law as set forth in Wait and Bloom.

Respondent also urges that it stretches credibility beyond reason when the Secretary claims his operation affects interstat commerce merely because the shovel or gasoline he buys has been manufactured in another state.

In connection with this argument I note that the Federal Mine Safety and Health Act applies to mines "the products of which enter commerce, or the operations or products of which affect commerce" 30 U.S.C. 803. The above language was taken from the Coal Mine Safety Act of 1969 and it indicates that the Congress intended to exercise its full authority under the Commerce Clause. Cf. Capitol Aggregates, 2 FMSHRC 2373 (1980). Judicial interpretation of the term "affect commerce" includes indirect activities which in isolation might be deemed to be merely local but which none-the-less affect commerce. N.L.R.B. v. Superior Lumber Company, 121 F.2d 823 (3rd Cir. 1971, 50 A.L.R. 2d 1228, 1235). In addition, the size of the business enterprise involved is not controlling unless Congress makes it so. N.L.R.B. v. Fainblatt et al, 306 U.S. 601, 59 S. Ct. 668, 672. An example of the size of an enterprise which has been determined to have an affect on commerce may be found in Wickard v Filburn, 317 U.S. 111, 63 S. Ct. 82 wherein a farmer exceeded hi wheat allotment of 11.1 acres. It was held that the 11.9 excess acreage was prohibited by the statutory scheme of the Agricultural Adjustment Act of 1938 (as amended).

Respondent's arguments also attack MSHA's programs. He asserts there is a lack of professional conduct on MSHA's part i pursuing small miners and prospectors.

The evidence does not support this claim. MSHA is obliged by Congressional mandate to pursue those operators who are subject to the Act. MSHA cannot be faulted for seeking to inspect respondent's gold mine.

I have carefully considered respondent's arguments and found them to be without merit. I, accordingly, conclude that the citation should be affirmed.

Civil Penalty

In assessing a civil penalty the Secretary, in accordance with his regulations, proposed a special assessment.

On the basis of the facts available to him he concluded that on June 21, 1984, the owner and operator of the underground mine denied entry to the inspectors to conduct their official inspection duties without a search warrant. After a discussion of the matter, the owner, C.D. Livingston, continued to deny the inspectors the right to conduct the inspections.

On June 21, 1984 a Section 104(a) a citation was issued to C.D. Livingston for violating Section 103(a) of the Federal Mine Safety and Health Act of 1977.

On the same day, after the expiration of a reasonable period of time to allow management to comply with the citation, a Section 104(b) Order of Withdrawal was issued for failure to abate Citation No. 2363602.

In proposing his penalty the Secretary concluded that it constituted an extremely serious violation of the federal law to prohibit federal mine inspectors from inspecting the mines to determine compliance efforts. Such a practice could only be the result of intentional conduct on the part of management.

There were no previously assessed civil penalties for denial of entry. The size of the company was noted as 520 production tons.

The Secretary finally concluded that based on the six criteria set forth in 30 C.F.R. 100.3(a) and on the information available to the Office of Assessments, he would propose a civil penalty of $250.

Based on the record here I deem that a civil penalty of $250 is appropriate and it should be affirmed.

Conclusions of Law

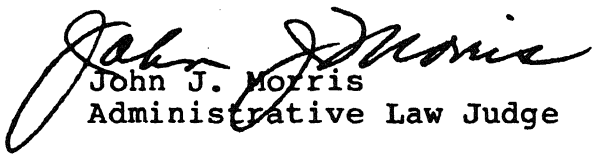
Based on the entire record and the findings herein the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

ORDER

Based on the findings of fact and conclusions of law herei
I enter the following order:

Citation 2363602 and the proposed penalty of $250 are
affirmed.



John J. Morris
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 84-400
	:	A.C. No. 46-06378-03521
v.	:	
	:	Maben No. 6 Mine
MABEN ENERGY CORPORATION, Respondent	:	

DECISION

Appearances: Jonathan M. Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; William D. Stover, Esq., Maben Energy Corporation, Beckley, West Virginia, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $750 for one alleged violation of mandatory safety standard 30 C.F.R. § 75.1722(b). The violation is in the form of a section 104(d)(1) citation, with special "S&S" findings, issued by MSHA Inspector James Christian on April 18, 1984.

The respondent filed a timely answer contesting the proposed civil penalty assessment, and a hearing was held in Beckley, West Virginia, on May 2, 1985. The parties filed posthearing briefs, and the arguments made therein have been considered by me in the adjudication of this case.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801, et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i)

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The principal issue presented in this proceeding is (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalty, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteri set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty t the size of the business of the operator, (3) whether the operator was negligent, (4) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification o the violation.

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. The respondent is owner and operator of the No. 6 Mine, and both the mine and the respondent are subject to the Act.

2. The presiding Judge has jurisdiction to hear and decide this matter.

3. At all times relevant to this case, MSHA Inspectors James Christian and Gary Taylor were acting in their official capacity as designated authorized representatives of the Secretary of Labor.

4. The citation in issue in this case was properly served at the mine on a representative of the respondent.

5. Mine production at the No. 6 Mine for the year 1984 was approximately 43,543 tons, and overall production for the respondent for 1984 was approximately 941,936 tons.

6. Payment of the assessed civil penalty for the citation in question will not adversely affect the respondent's ability to continue in business.

Prehearing rulings

During a bench discussion concerning the issues presented for trial, the parties were advised that while the citation which gave rise to the civil penalty proposal by the petitioner is in the form of a section 104(d)(1) unwarrantable failure citation, with special "S&S" findings, the validity of the inspector's "unwarrantable failure" finding is not an issue, but that I would consider it as part of my civil penalty negligence findings. The parties were also advised that while the inspector issued a section 104(b) order after finding that the respondent failed to abate the citation in good faith, the validity of that order is not at issue in this case, and MSHA has not included it as a part of its civil penalty proposal (Tr. 6-8).

Petitioner's counsel stated that he was in agreement with my ruling concerning the reviewability of an unwarrantable failure finding by an inspector in a civil penalty proceeding (Tr. 11-12).

Respondent's counsel agreed with my ruling concerning the section 104(b) order (Tr. 8). However, he took the position that the "unwarrantable failure" finding by the inspector presented a question of lack of "notice" to the operator that it had prior knowledge of the violative conditions (Tr. 10). In support of his position, counsel cited the Price River Coal Company decision issued by former Commission Judge Virgil Vail on October 7, 1983, WEST 80-83, 5 FMSHRC 1766, 3 MSHC 1158 (1983). After further consideration of this issue, the parties were advised that for purposes of the trial, my rulings would stand, and the respondent's counsel was advised that he was free to take exception with my ruling and discuss it in any posthearing brief (Tr. 12).

After futher consideration of this issue, my pre-trial ruling that an inspector's unwarrantable failure finding is not reviewable in a civil penalty proceeding is REAFFIRMED. In the Price River Coal Company case, Judge Vail relied on

the Commission's decision in Cement Division, National Gypsum Company, 2 MSHC 1201 (1981), to support his conclusion that an inspector's unwarrantable failure finding is reviewable in a civil penalty case. In the National Gypsum case, the Commission decided the interpretation to be placed on a "significant and substantial" (S&S) violation, and while it did so in the context of a civil penalty proceeding, I cannot construe the decision as supporting authority for the conclusion that an unwarrantable failure finding is reviewable in a civil penalty proceeding. I do not construe the Commission's comment that unwarrantable failure findings "are important" as precedent for holding that such findings are reviewable in a civil penalty case. The Commission made no such ruling in the National Gypsum case. Further, in a recent decision issued by the Commission on August 5, 1985, in Black Diamond Coal Mining Company, Docket No. SE 82-48, the Commission affirmed my decision on this issue in that case.

Discussion

The section 104(d)(1) "S&S" citation issued by Inspector Christian at 9:04 a.m., on April 18, 1984, cites a violation of 30 C.F.R. § 75.1722(b), and the cited condition or practice is described as follows:

> The number 1 belt conveyor tail pulley was not adequately guarded to prevent a person reaching behind the guard and becoming caught in between the belt and pulley; in that, conveyor belt was used as a guard at the back end of the tail pulley and such material was laying on the belt jack posts which allowed an opening of 18 inches vertical and 12 inches horizontally to exist behind the belt pulley; the side opening guards on the inby end of the belt conveyor tail pulley were gone, exposing the tail pulley to an opening of approximately 12 x 12 inches. According to the belt conveyor examiner book the belt conveyors are examined each coal producing shift and this condition appeared to have existed for weeks.

Petitioner's Testimony and Evidence

MSHA Inspector James Christian testified that he has been a mine inspector for 18 years and has 23 years of mining experience. He stated that he has fire boss and mine

foreman's certicates from the State of West Virginia, and that he has taken a 13 week mine training course at the West Virginia University.

Mr. Christian identified a copy of the citation which he issued (Exhibit P-1), and he confirmed that mine foreman Mike Ayers accompanied him during his inspection on April 18, 1984. The inspection began on the surface and continued underground, and it was conducted during the day production shift. The No. 1 belt conveyor was in operation conveying coal from the working section, and the height of the coal ranged from 30 to 32 inches, and the belt entry was approximately 20 feet wide. The belt had travelways on both sides, and they were approximately 12 to 13 feet wide on the "clear side", and 3 feet wide on the rib side. The travelway clearance on the rib side ranged from 18 to 36 inches between the rib timbers and the belt structure.

Mr. Christian identified a diagram of a "typical belt conveyor tail pulley," and indicated that it was representative of the tail pulley which he cited. He described the tail pulley operation, and he indicated that it consisted of one larger roller at the back end of the belt conveyor with a bearing holder which supported the tail roller at each side. He indicated that the pulley was not powered and that it simply supported the belt and turned with the belt as it moved over the pulley.

Mr. Christian stated that when he inspected the tail pulley he found that it was guarded at the rear by a piece of belt material approximately 12 inches wide and 18 inches long. The belting material was bolted to the top frame of the conveyor and it extended at an angle to the mine floor over two permanent belt conveyor jacks (No. 3 on Exhibit P-3). However, both sides of the rear of the pulley were not guarded by the belt material and these areas were exposed and open. He also observed two unguarded openings on each side of the belt conveyor structure, and he estimated that these "rectangular" openings were 12 inches by 12 inches. These openings were part of the conveyor structure itself and were in close proximity to the tail pulley. In his opinion, all of these unguarded openings were readily observable, and he estimated that the pulley "pinch points" were about 3 inches from the unguarded openings.

Mr. Christian stated that the unguarded pulley appeared to have been in this condition for weeks. The belt stands were rusty, and there was coal dust and float coal dust accumulated on the pulley. The area was required to be inspected

at least once a day, and he believed that one or two people would be exposed to a hazard. The belt examiner would be there for 5 minutes while visually inspecting the tail pulley area, and the belt cleaner would be there for approximately 15 minutes shovelling and removing coal from under the pulley on both sides. A mechanic would also have occasion to be in the area greasing the pulley bearings at least once during the shift.

Mr. Christian stated that it was possible for some one to reach into the unguarded openings to clean up loose coal or rocks, and the installation of guards to cover the openings would serve to remove this temptation. Mr. Christian also stated that the area around the pulley was damp and wet, and he observed a shovel adjacent to the pulley, as well as some coal materials which appeared to have been cleaned up and placed in a pile. This led him to believe that someone had been there earlier cleaning up coal accumulations.

Mr. Christian stated that when he pointed out the unguarded locations to Mr. Ayers, he conceded the violation and agreed that the tail pulley was inadequately guarded. Mr. Christian confirmed that he discussed the use of belting material as guarding, and suggested that metal guarding materials would be more permanent and could not be removed. Mr. Christian advised Mr. Ayers that he would prefer metal guarding, and he fixed the abatement time as the next morning. Mr. Ayers informed him that he could possibly obtain the metal guarding materials from another mine approximately 15 miles away, and once the material was obtained, it would take approximately an hour or so to install it.

Mr. Christian stated that when he returned to the mine the next day, he went to the tail pulley area at approximately 11:00 a.m., and the guards were being installed. Mr. Christian believed that the abatement work could have been completed in 2 hours during the prior shift, and he anticipated that this work would have been completed by the start of the shift the next morning (Tr. 15-41).

On cross-examination, Mr. Christian stated that he found the violation to be significant and substantial because the openings in the belt guards, and the unguarded openings on both sides of the conveyor, presented a reasonably likelihood that a person would reach in and behind the unguarded areas. In addition, he believed that someone could contact the unguarded tail pulley through carelessness, and that someone could slip and get their arm into the

unguarded areas while travelling by or while greasing or cleaning the pulley. However, he conceded that due to the low coal height, anyone in the area would be crawling on their hands and knees, and he confirmed that he and Mr. Ayers had to crawl in to inspect the pulley area.

Mr. Christian confirmed that he examined the belt examiner's books but found nothing noted about the tail pulley. He also stated that MSHA's guarding policy guidelines require that equipment guards be installed or bolted to the belt conveyor in such a manner as to require a wrench to remove them. He confirmed that he had inspected the mine in the past but had not previously observed the unguarded tail pulley and issued no prior guarding citations.

In response to further questions, Mr. Christian stated that he issued no citations for coal accumulations on the tail pulley or for any tripping or stumbling hazards in the tail pulley area. He also confirmed that he had no knowledge concerning the mine belt cleaning or maintenance procedures, nor did he know whether the belt was ever shut down when the pulley was cleaned or greased (Tr. 41-76).

MSHA Inspector Gary Taylor testified as to his mining experience, and he confirmed that he has been an inspector since 1975. He holds an associate degree in mining from the Beckley University, has received MSHA training, and has State of West Virginia mine foreman's papers.

Mr. Taylor confirmed that he was at the mine on April 19, 1984, and conducted an inspection with Mr. Christian. He was accompanied by mine electrician Paul Gillespie, and they went to the tail pulley area to determine whether the conditions cited by Mr. Christian the previous day had been abated. Mr. Taylor found that the guarding had not been installed and that the conditions as testified to by Mr. Christian still existed. The area was wet and muddy, and he detected a "slight dip" in the mine floor in the tail pulley area.

Mr. Taylor stated that when he inspected the tail pulley, he found no evidence that any work had been done to correct the cited conditions. Mr. Gillespie left the area to see about the guarding, and returned within 40 to 45 minutes to install the guards. Mr. Taylor helped him bring in the guards and assisted him in the abatement.

Mr. Taylor stated that before Mr. Gillespie left to find the material, he requested Mr. Gillespie to shut the belt down because the cited conditions had not been abated.

Mr. Taylor believed that a slipping and falling hazard still existed, and he agreed with Mr. Christian's determination that a hazardous condition existed at the unguarded tail pulley locations. Mr. Taylor believed that the respondent did not exhibit good faith compliance because the conditions were not abated within the time fixed by Mr. Christian (Tr. 77-89).

On cross-examination, Mr. Taylor confirmed that other conveyor belt locations had unguarded openings similar to the openings found by Mr. Christian on both sides of the tail pulley area, but he indicated that guards would not be feasible at those locations because the openings provided a means of ventilating the belt. The installation of guards at those locations would result in possible belt heating and would create a greater hazard. He also indicated that these other open areas were simply near the belt rollers which supported the belt and that if anyone reached in the "worst thing that could happen" would be a mashed finger or a broken hand or wrist. The injuries at the cited unguarded tail pulley in question, however, would be more severe, including the possible loss of a limb (Tr. 90-93).

Respondent's Testimony and Evidence

Fred E. Fergusen, testified that he is the principal stock holder of Maben Energy, and that he is familiar with the citation issued by Inspector Christian. Mr. Fergusen confirmed that he was formerly employed by MSHA as a supervisory inspector and that Mr. Christian and Mr. Taylor at one time worked under his supervision. He also confirmed that he was involved in the management of the mine, and he expressed concern over the lack of consistency among the inspectors as to the kinds of guards required by section 75.1722. He stated that the belt guarding used to guard the tail pulley in question had been previously installed on that same pulley before the belt was lengthened and moved to the location where Mr. Christian inspected it on April 18, 1984. Although the guarding had been previously cited as inadequate, after the belt was moved, Mr. Christian reinspected the pulley and found the belt guarding to be adequate.

Mr. Fergusen stated that he went to the cited tail pulley area after the belt was shut down by Inspector Taylor on April 19, 1984. In Mr. Fergusen's opinion, the guarding was adequate and he denied the existence of any hazardous conditions. He stated that the same exposed areas existed

along many belt locations, but that these areas had never been cited and guards have never been required.

Mr. Fergusen stated that the belt which moves over the cited tail pulley moves from the bottom to the top and over the pulley in a counter-clockwise manner, and he did not believe that an injury would result if anyone reached in. Mr. Fergusen stated further that while in the tail pulley area after the belt was shut down, he had to lie down and contort his body in order to reach in and contact the pulley and roller. He indicated that the tail piece is only 16 inches high, and he believed that it was guarded better than other walkway areas along the belt line. He also stated that grease hoses are installed at the tail pulley, and that anyone servicing or greasing the pulley would be 20 to 30 inches away. He also indicated that anyone cleaning in the area would use a shovel to reach any accumulations under and around the tail pulley.

Mr. Fergusen stated that it was his understanding that the expanded metal materials required to fabricate the guards had been ordered, but after Mr. Taylor shut the belt down and production ceased, he instructed that scrap metal be used to fabricate the guards so that the citation could be abated while awaiting the ordered materials (Tr. 93-99).

On cross-examination, Mr. Fergusen stated that the metal materials used to guard the belt would have been ordered through a local supply house that services most of Maben's mines. He indicated that Mr. Gillespie and another maintenance man work from 9:00 a.m. to 5:00 p.m., and that their shift overlaps the regular working shift which is from 7:00 a.m. to 3:00 p.m. Since Inspector Christian would not accept chain link fencing as adequate guarding material, Mr. Fergusen assumed that he would have allowed more time to order and install the expanded metal guarding. Since the order was issued shutting down production, Mr. Gillespie had to obtain scrap pieces of expanded metal and fabricate it into adequate guarding. Had Mr. Gillespie been allowed to use rubber guarding or fencing material, he could have abated the cited condition the first day (Tr. 100-102). He believed that Mr. Gillespie "did a quick job" of guarding in order to resume production (Tr. 103).

Mr. Fergusen stated that the rubber guarding on the belt in question had been installed after another MSHA Inspector (Simmons) indicated that he wanted it guarded that way, and that until Mr. Christian's inspection, it was always guarded in that fashion (Tr. 106). Mr. Fergusen identified a

citation issued by Inspector Robert Simmons, No. 2124785, issued on November 7, 1983, in which Mr. Simmons found that an 8 foot piece of belt had been placed over the tail roller in an attempt to guard it. Mr. Fergusen stated that abatement was achieved in that instance by simply bolting the rubber belting to the frame of the belt, and that Mr. Simmons accepted this as adequate (Tr. 109-111).

Mr. Fergusen confirmed that he had contacted MSHA's district office about his guarding problems and the fact that inspectors were requiring different kinds of guarding, but he denied that he had agreed to submit any guarding plans for MSHA's approval. He stated that he resisted efforts to require him to submit "big, vast drawings as to how to guard belt heads" (Tr. 115).

Mr. Fergusen stated that there are openings along the entire belt structure and that some MSHA inspectors want them guarded, while others do not (Tr. 118). He also alluded to other belt areas which in his opinion present hazards, but which are not required to be guarded (Tr. 120-122). He confirmed that in 1984, all of the mine belt heads were completely guarded with either chain link fencing, belting material, or expanded metal (Tr. 122).

Inspector Christian was recalled as the Court's witness, and he confirmed that he did speak with Mr. Ayers about the abatement. He stated that he told Mr. Ayers that the use of rubber guarding material was acceptable, as long as it was secure. He also told Mr. Ayers that something "more substantial" should be used (Tr. 131). Mr. Christian indicated that the use of a chain link fence could have been discussed, and that he would accept this as long as it was securely installed in such a manner to preclude one from reaching through and coming into contact with moving parts (Tr. 132).

Mr. Christian stated that when he fixed the abatement time, he was under the impression through a discussion with Mr. Ayers that the materials were readily available at the mine (Tr. 134). Mr. Christian stated that he issued the citation because the belting material did not cover the exposed part of the back of the tail roller, and because the belting was simply lying over the support posts, with an exposed opening in the back "where it could be got into" (Tr. 135). He confirmed that had the exposed areas been covered by belting material, he would have accepted it as adequate (Tr. 136). He stated that inspectors can "suggest" the type of guarding materials to be used for guarding

exposed belt areas, but they cannot "insist" that any particular type of material be used (Tr. 136-137).

Mr. Christian believed that Mr. Fergusen was well aware of the type of guarding required to comply with the cited standard, and he confirmed that Mr. Fergusen at one time worked as an MSHA supervisor. Mr. Christian saw no conflict in MSHA's guarding policy and Mr. Fergusen's knowledge as to what is required to achieve compliance (Tr. 139).

Inspector Taylor was recalled as the Court's witness, and he confirmed that when he returned to the mine on April 19th to abate the violation, he discussed the matter with Mr. Christian on their way to the mine. Mr. Christian told him that he had advised Mr. Ayers that while he could use rubber guarding to abate the citation, he (Christian) recommended that metal material be used. Mr. Christian also told him that either "Mr. Ayers or the supply man outside" told him that the metal guarding material had been ordered and would be installed the evening of the April 18th (Tr. 141-142).

Mr. Taylor stated that when he returned to the mine on April 19th, he spoke with the mine foreman in his office, and the foreman was under the impression that the abatement work had been done (Tr 142). Later, when he found that the belt opening had not been guarded, the person who accompanied him stated that he knew nothing about it. This person may have been Mr. Gillespie, and after he shut the belt down, the individual left and returned 30 or 40 minutes later with some metal materials to install as a guard. After some adjustments to the materials, Mr. Taylor helped to install the metal guarding in order to achieve abatement (Tr. 143-145). Although he saw Mr. Fergusen shortly after this work was done, he did not speak to him. However, he spoke with Mr. Ayers, and Mr. Ayers stated that he thought the condition had been taken care of (Tr. 146).

Mr. Fergusen stated that the material used to abate the condition was heavy corrugated metal, and since it was rusty in places, he assumed that it had been lying in a supply yard. The abatement work took 40 to 45 minutes (Tr. 147).

Mr. Taylor was of the opinion that had the cited condition been allowed to continue for any period of time, a reasonable man would expect a person to get caught at some time (Tr. 149). Mr. Taylor stated that while the belt was down, and while he was near the openings cited by

Mr. Christian, he did not attempt to reach in to determine if he could reach the exposed parts (Tr. 150).

Paul Gillespie testified that he is employed by the respondent as an electrician and that he has worked at the mine for 4 years. He is a union member, and has 20 years experience in the mines, including 15 years as an electrician. He confirmed that he is familar with the tail pulley area and visited it once each week during his electrical inspection. He identified exhibit R-2 as a mine map which accurately reflects the mine workings. He stated that the tail pulley in question was located approximately 50 feet inby the green "X" mark on the map. He identified the areas marked in red on the map as those areas where coal was being mined. He also identified the "short yellow" line on the map as the No. 1 belt line, and the "long yellow" line as the No. 2 belt line. He also stated that miners did not normally travel past the tail pulley on their way in and out of the mine working areas.

Mr. Gillespie stated that the individual who serviced the tail pulley on a daily basis would be in the cited area for approximately 5 minutes, and while greasing the pulley he would be behind the pulley or "off to the side" approximately a foot away. The belt was equipped with 18 to 20 inch grease hoses for greasing the pulley, and the service man would be on his hands and knees while performing this work. Mr. Gillespie stated that the average height of the coal in this area was 24 to 25 inches, but at the immediate area of the tail pulley, it was 20 inches high, and the entry was 26 inches. The width of the travel way on the "clearance side" of the belt was 15 to 18 feet, and on the "rib side," the clearance was approximately 3 feet.

Mr. Gillespie estimated that the rubber belting material which was cited by Inspector Christian had been bolted on the frame of the belt conveyor for about a year prior to the issuance of the citation on April 18, 1984. Mr. Gillespie was of the opinion that the belting material was adequate to guard the tail pulley, and he did not believe that the guarding presented any hazards. He stated that he "could stay away from the pulley" in the event greasing or cleaning had to be done, but he conceded that "someone could get into it if they tried."

Mr. Gillespie stated that after the citation was issued, mine foreman Ayers instructed him to remove the belting material and to reguard the tailpiece. Although no particular type of material was mentioned as suitable for guarding,

Mr. Gillespie confirmed that he (Gillespie) suggested chain link fencing, and after locating some of this material, he cut it to size and arranged to transport it into the mine at approximately 11:00 a.m. that same day. However, when he informed Inspector Christian that he intended to set some timber posts in place and attach the fencing to the posts, Mr. Christian informed him that the fencing had to be anchored or fastened directly to the frame of the belt. Mr. Gillespie determined that this was not feasible, and that during his further discussion with Mr. Christian, the use of corrugated or expandable metal guarding material was discussed.

Mr. Gillespie stated that Inspector Christian informed him that the use of rubber belting material was not acceptable as a suitable guard because it did not provide for ventilation of the belt, and since it would contain any heat generated by the belt, it could be a hazard. Mr. Gillespie stated that he assumed that Mr. Christian preferred that some kind of metal material be used for guarding the tailpiece, and he agreed with the inspector's assessment that metal guarding would provide a better guard. However, since the metal material was not available at the mine, Mr. Gillespie had to order it from a supplier, and he did so. He left the rubber belting on the tailpiece pending the arrival of the ordered metal material, and since the belting had been in place for a year, Mr. Gillespie believed that "it was good enough."

Mr. Gillespie stated that when Mr. Christian returned to the mine on April 19, Inspector Taylor was with him. Mr. Taylor informed Mr. Gillespie that he wanted to inspect the tailpiece which had been previously cited, and they both proceeded to that area. When Mr. Taylor found the rubber belting still on the tailpiece, he informed Mr. Gillespie that it should have been replaced by 8:00 a.m. that morning. Mr. Gillespie stated that he explained to Mr. Taylor that corrugated or expanded materials were not available, but that he had ordered the material and was waiting for its arrival. Mr. Taylor then instructed him to shut the belt line down, and Mr. Gillespie immediately complied. Mr. Gillespie then informed the mine foreman that the belt had been shut down. In order to get back into production, Mr. Gillespie was later informed to find "some scrap metal" material and to fabricate a guard to suit the inspectors. Mr. Gillespie found some material, and after cutting it to suitable size, he brought it into the mine and installed the guarding completely around the tailpiece by bolting it to the belt frame. Mr. Gillespie estimated that once the metal guarding was cut and prepared,

it took him approximately 45 to 50 minutes to install it (Tr. 151-166).

On cross-examination Mr. Gillespie confirmed that grease hoses were in place on the tailpiece at the time the citation was issued, and he indicated that anyone servicing the pulley had to be on all fours or lying down. He also confirmed that on the "tight side" of the belt, the clearance was reduced to 12 to 18 inches because of the timbers which were in place. He stated that anyone on their hands and knees in the proximity of the tailpiece would be on "the same level" as the exposed tail pulley area. He agreed with Inspector Christian's estimate that the distance between the conveyor frame and the exposed pinch points was 3 inches. Mr. Gillespie could not recall where he obtained the scrap metal material used to guard the tailpiece.

In response to further questions, Mr. Gillespie stated that he had no knowledge as to the manner in which the belt location cited in the past by MSHA Inspector Simmons was guarded (Tr. 171). Mr. Gillespie was of the opinion that if anyone made a conscious effort to reach into the tail pulley openings, they would make contact and get caught in the pulley (Tr. 172). He confirmed that the belt would be running while he was greasing it or cleaning up around the tail piece. He confirmed that the tail piece is raised up off the floor, and that even though he is on his knees, he can use a shovel for cleaning up the coal around the tail piece. The belt is running while this cleanup takes place, and the coal which is cleaned up is simply placed on the belt (Tr. 173). Mr. Gillespie indicated that he is in the area once a week during his weekly electrical inspection, and he confirmed that he was not involved in the initial installation of the belting which was used to guard the tail pulley, nor was he involved in the moving of the tail piece (Tr. 174).

James Ayers testified that he has served as the respondent's mine foreman for approximately 3-1/2 years, and that he has worked in the mining industry for 19 years. He confirmed that he and Inspector Christian travelled together during the inspection of April 18, 1984, that he is aware of the citation, and confirmed that it was served on him.

Mr. Ayers stated that Inspector Christian informed him that both sides of the conveyor belt needed to be guarded at the places which were open and exposed and not guarded by the rubber belting material. Once the citation was issued,

Mr. Ayers left the matter up to electrician Gillespie, including the matter as to how it was to be guarded. Mr. Ayers denied telling Mr. Gillespie as to the type of material to use to guard the tail pulley, and he confirmed that Mr. Gillesie did suggest the use of chain link fencing material. Mr. Ayers believed that Mr. Gillespie would install the chain link fencing material sometime after 3:00 p.m., on April 18, during the maintenance period regularly scheduled each day between 3:00 p.m. and 5:00 p.m.

Mr. Ayers stated that the belt is inspected every day during the preshift inspection, and that he inspected it on the morning on April 18. Mr. Ayers was of the view that the existing belting material which was bolted to the conveyor frame, and which covered the rear of the tail piece pulley, was adequate and complied with MSHA's guarding regulations. Mr. Ayers stated that before the tail piece was moved during the lengthening of the belt line, the tail pulley had been guarded with the same rubber belting material over the end of the tailpiece, and that a previous inspector had approved of this guarding method. The previous inspector also advised him that as long as the tail piece was guarded at the rear, it was not necessary to guard the sides. However, Inspector Christian insisted that the sides, as well as the rear of the tail piece, had to be guarded. Mr. Ayers stated that he did not believe that anyone could have contacted any exposed belt moving parts unless they made a deliberate effort to do so.

Mr. Ayers stated that when Inspector Christian returned to the mine on April 19, Inspector Taylor was with him. Mr. Ayers accompanied Mr. Christian on his inspection rounds that day, and Mr. Taylor accompanied Mr. Gillespie. Mr. Ayers stated that he was not concerned about the cited tail pulley because he assumed Mr. Gillespie had taken care of it, and since Mr. Gillespie always does a good job, he assumed that he had taken care of the matter. Mr. Ayers stated that he first learned that the guarding had not been replaced when the belt was shut down. He and Mr. Christian went to the area at approximately 9:00 or 9:30 a.m., and Mr. Gillespie and Mr. Taylor were there. Mr. Gillespie informed him that the material necessary to repair the guarding was on its way (Tr. 175-184).

On cross-examination, Mr. Ayers stated that if anyone "really wanted to" stick his hand into the tail pulley, they could do it. He also agreed that the exposed portion of the pulley was on the same level as anyone crawling around on their hands and knees, and while he indicated that he has

never slipped in the 3-1/2 years he has worked in the pulley area, he could not state whether or not it was possible for anyone to slip while crawling around the area.

Mr. Ayers confirmed that he observed grease hoses on each side of the belt in question, but he did not know where Mr. Gillespie obtained the metal material used to guard the belt. He described the unguarded areas which concerned Inspector Christian, and stated that Mr. Christian was only concerned about the exposed and unguarded "side areas" of the belt (Tr. 186-188; 191-192). Mr. Ayers described how the guarding was attached to the belt to achieve abatement, and he conceded that there would be no reason to take the guarding off to perform maintenance or greasing on the belt (Tr. 194).

In response to further questions, Mr. Ayers stated that he and Inspector Christian had on prior occasions travelled the same belt tail piece, but that Mr. Christian never mentioned the lack of adequate guarding (Tr. 197).

Inspector Christian was called by MSHA in rebuttal, and he stated that he could not recall whether or not he observed any grease fittings on the belt at the time he issued the citation (Tr. 199). He also had no recollection of having observed the belt in that same condition during prior inspections (Tr. 200-201).

Mr. Christian stated that any guarding which would not permit one to come in contact with moving belt parts by getting in between the guarding material and the belt would be acceptable as compliance. He agreed that there was some disagreement among inspectors as to what is acceptable guarding, and he confirmed that MSHA's policy is that guarding simply nailed to a post which could be readily knocked down or removed is not acceptable. He also confirmed that in his district, corrugated materials and well-installed fencing materials are considered to be acceptable means for guarding belts (Tr. 206-208).

Inspector Taylor was also called in rebuttal, and he stated that he was present during a conference held sometime between November, 1983, and April, 1984, and that he overheard his supervisor suggest to Mr. Fergusen that he come up with a simple drawing as to how a belt guard would be fabricated so that MSHA could review it to determine whether it would be acceptable (Tr. 209).

Findings and Conclusions

Fact of Violation

The citation in this case charges the respondent with a failure to adequately guard a belt conveyor tail pulley. The cited mandatory safety standard, 30 C.F.R. § 75.1722(b), provides as follows: "Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley."

In defense of the citation, the respondent cites the case of Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094, September 24, 1984, where the Commission upheld a citation for a violation of 30 C.F.R. § 77.400(a), a surface mining standard requiring the guarding of mechanical equipment exposed moving parts "which may be contacted by persons, and which may cause injury to persons." Respondent asserts that the Commission ruled that the construction of the cited section contemplated a showing of a reasonable possibility of contact and injury. Respondent concludes that in the instant case, the petitioner must first establish that there was a reasonable possibility of contact and injury before a prima facie case of a violation is met.

In support of its argument that the petitioner has not established that there was a reasonable possibility of contact and injury in this case, respondent asserts the following:

1. The lack of worker activity in the area (5 minutes per day) which presented a very minimum worker exposure to whatever slight hazard was present.

2. The low seam height where the tail pulley was located necessitated a worker being on all fours and laying down while performing the work necessary to the tail pulley, which in turn made slipping a virtual impossibility during the performance of the work duties.

3. The travelway to the tail pulley had a 12' to 13' clearance.

4. Cleaning and greasing could be accomplished from a safe distance (24-30 inches).

5. The tail pulley was guarded from the rear by a piece of belt material anchored to the back frame by bolts (Tr 24).

6. The tail pulley was located off the main travelway to the working section of the mine and whatever hazard was present, slight, if any, was not exposed to workers entering or leaving the mine.

In the Thompson Brothers case, Judge Broderick rejected the operator's argument that it was virtually impossible for a person not suicidally inclined to contact the unguarded moving parts in question, and he accepted the testimony of the inspector that the unguarded parts were accessible and might be contacted by persons examining or working on the equipment. In affirming Judge Broderick's decision, the Commission stated as follows at 6 FMSHRC 2097:

> The standard requires the guarding of machine parts only when they "may be contacted" and "may cause injury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis. (Emphasis added.)

I take note of the fact in Thompson Brothers, the Commission fashioned its "likelihood of contact and injury" test after analyzing the "may cause injury" language of section 77.400(a). The comparable standard for underground mines, section 75.1722(a), contains identical language, and applies in instances where designated equipment is not provided with guards. However, in the instant case, the respondent is charged with a violation of subsection (b) of section 75.1722, which contains no such language. The cited standard here requires that guards provided for certain designated equipment be sufficient to prevent a person from reaching behind the guard and being caught between the belt and the pulley.

Inspector Christian testified that he issued the citation because the tail pulley in question was not adequately guarded at the back on both sides where a piece of belting had been installed over the pulley, and in two areas on either side and in front of the tail roller where the configuration of the belt framework resulted in openings which were not guarded. At the time of the inspection, the section was in production and the belt was running. Mr. Christian's unrebutted testimony is that the pinch points were about 3 inches from the unguarded openings, and that it was possible for anyone to reach in and contact the unguarded openings. He also believed that anyone in the area cleaning up, greasing, or inspecting the area could contact the pinch points through carelessness or slipping or tripping on the adjacent travelways. Inspector Taylor, who viewed the unguarded area the next day when he visited the mine to abate the citation, agreed with Inspector Christian's assessment of the hazards presented by the inadequately guarded pulley.

Mine electrician Paul Gillespie agreed with Inspector Christian's assertion that the unguarded pinch points were some 3 inches from the conveyor belt framework, and while he personally did not feel threatened by any hazard posed by the unguarded pulley and indicated that he could stay away from it while greasing it or cleaning up, he conceded that anyone could readily contact the pinch points if they tried. He also confirmed that the belt is running while cleanup and greasing is conducted. Although section foreman James Ayers was of the opinion that the pulley was adequately guarded, he conceded that anyone making a deliberate effort to contact the pinch points could do so, and he agreed that the exposed unguarded pulley was at the same level as anyone crawling around the area on their hands and knees.

Although the inspector agreed that the belt examiner would only be in the area for 5 minutes while visually observing the belt, he also indicated that belt cleaners are there for longer periods while cleaning up under and on both sides of the pulley, and that a mechanic would also be there at least once during each shift greasing the pulley bearings. Although Mr. Gillespie testified that grease hoses were provided to permit greasing from a distance of a foot or so from behind or to the side of the unguarded pulley, he also indicated that a service man would be on his hands and knees while performing this work. While the presence of grease hoses would reduce the likelihood of injury, the fact remains that the pulley was located in a rather confined area where the travelway inclined, and where men had to crawl around on their hands and knees. Given the fact that cleanup personnel, mechanics, and belt examiners were regularly in the area at least once a shift, and had to crawl around the unguarded area, the confinement itself added to the possibility of someone inadvertently coming in contact with the unguarded pulley pinch points located only 3 inches from the belt structure.

Although it is true that the low coal seam and confined area may have reduced the chances of someone tripping or falling, the fact is that the persons crawling around the area on all fours would be at the approximate same level as the unguarded pulley. Given the additional fact that clean up and greasing was done with the belt running, this increased the possibility of someone being seriously injured in the event they contacted the unguarded pulley, particularly with respect to the cleanup man, with shovel in hand, and on all fours, working around the unguarded pulley. In addition, since the area was wet and muddy, one can reasonably conclude that a person on his hands and knees performing work around the pulley would be in jeopardy of sliding or losing his balance.

On the facts of this case, while it seems clear that the back of the pulley was guarded with belting material, the belting did not extend to either side, and these areas were left exposed. The additional openings in the belt frame forward of the pulley were totally unguarded. Thus, I conclude and find that the petitioner has established by a preponderance of the credible evidence that the guarding was inadequate and constituted a violation of section 75.1722(b). Further, given the aforementioned circumstances with regard to the working conditions and the presence of miners in the unguarded areas with the belt running, I conclude and find further that it was reasonably likely that someone could inadvertently or through carelessness, come in contact with

the unguarded pulley pinch point while the belt was running, and that a serious injury would result. For these same reasons, I also conclude and find that the violation was significant and substantial. Accordingly, the citation IS AFFIRMED.

History of Prior Violations

Exhibit P-4, is a computer printout listing the respondent's civil penalty assessment record for the period April 18, 1982 through April 17, 1984. That record reflects that the respondent paid civil penalty assessments totaling $3,058 for 72 section 104(a) citations issued at the mine. Two of those were for prior violations of section 75.1722(b), and one was for a violation of section 75.1722. For an operation of its size, I cannot conclude that the respondent's compliance record is such as to warrant any additional increase in the civl penalty assessment for the violation in question in this case.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

From the information provided by the parties in Stipulation No. 5, I conclude that the respondent is a small-to-medium sized operator. I adopt as my conclusion the stipulation by the parties that the civil penalty assessed in this case will not adversely affect the respondent's ability to continue in business.

Negligence

Respondent argues that since the tail pulley in question was guarded to the satisfaction of another MSHA inspector 1-year prior to the inspection conducted by Inspector Christian, and since Mr. Christian inspected the pulley at least once on a prior mine visit and issued no citation, it was entitled to rely on an assumption that the tail pulley was adequately guarded. Respondent also argues that the unguarded openings in question did not create such a dangerous hazard as to put it on notice that it required attention. Under these circumstances, the respondent concludes that it was not negligent.

Petitioner argues that the violation resulted from a high degree of negligence by the respondent. In support of its argument, petitioner asserts that the location of the

pulley was subject to daily inspections and that its testimony reflects that the condition had existed for a substantial period of time and was readily identifiable to anyone looking at the pulley (posthearing brief, pg. 4). Further, petitioner points out that on November 7, 1983, the respondent received a citation for the same condition cited in the instant case because an 8 foot piece of belt had been placed over the tail roller in an attempt to guard it. That was also the condition of the tail pulley when Mr. Christian issued his citation, and the respondent stated at the hearing that abatement in the prior instance consisted only of bolting the belt at the top.

Petitioner points to the testimony of Mr. Christian that the previous citation was discussed at the MSHA conference held in this case, and that it was made clear by the inspector who issued the November 7 citation, that abatement was achieved by securing the belt material at the sides, and all the way around the back of the tail piece. That is no less than what was required in the instant case. Petitioner concludes that it is simply incredible that MSHA would have acted otherwise, and that it is equally incredible that mine operator Fergusen, who was an MSHA inspector and supervisor for 10 years, would have been confused about the proper guarding procedure.

In response to the respondent's suggestion that MSHA is somehow estopped from issuing a citation because of its failure to do so in the past, petitioner cites the decision of Judge Morris in Secretary of Labor v. Southway Construction Co., 6 FMSHRC 2420, October 10, 1984, 3 MSHC 1656 (1984), rejecting an identical argument with respect to a violation of the guarding requirements of 30 C.F.R. § 56.14-1. Petitioner also cites the decisions in Bethlehem Mines Corporation v. Secretary of Labor, 2 MSHC 1039, 1040 (1980), and Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, 1588 744 F.2d 1411 (10th Cir. 1984), in support of its conclusion that an operator's failure to know that a condition constituted a violation of the law is not a defense to negligence.

After consideration of the arguments presented by the parties, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care to insure compliance with the requirements of the cited standard, and that the respondent was negligent. Although I am cognizant of the fact that MSHA inspector's have differed as to the adequate guarding requirements of section 77.1722(b), particularly with respect to what constitutes a "sufficient

distance" for extending a guard, and what is a "suitable" guarding material, it nonetheless seems clear to me that the petitioner's arguments on the negligence issue is correct. Respondent's assertions that it was not negligent are rejected.

Gravity

I conclude and find that the failure to completely guard the cited tail pulley on the belt which was running constituted a serious violation, particularly at those locations where the pinch points were some 3 inches from the openings.

Good Faith Compliance

The parties differ as to whether the violation was abated in good faith. Respondent maintains that delays were encountered because of the inspector's personal preferences concerning the type of materials to be used to guard the tail pulley, and the unavailability of guarding materials. Respondent also maintains that requiring the abatement work to be done on the same shift as the citation was issued was unreasonable in itself. Petitioner asserts that the respondent did not abate the violation in good faith and in a timely manner, and only did so after a withdrawal order was issued. Petitioner suggests that Mr. Gillespie and Mr. Ayers may have been nonchalant and uncaring about the abatement. Petitioner concludes that despite the fact that material and personnel were available to do the job, the respondent failed to abate within the time fixed by the inspector, and that its excuses for the delay should be rejected.

On direct examination, Inspector Christian testified that when he discussed the citation with Mr. Ayers, he discussed the use of rubber belting material as a guard, but suggested that metal guarding materials might be more suitable since they were of a more permanent nature and could not be easily removed. He also advised Mr. Ayers that he would prefer metal guarding, and Mr. Ayers responded that it was possible that this material could be obtained from another mine some 15 miles away. When Mr. Christian returned to the mine the next day at 6:30 am., he dispatched Inspector Taylor to the pulley area to see whether the abatement had been achieved, and Mr. Christian did not arrive there until approximately 11:00 a.m. At that time the metal guarding was in the process of being installed. Mr. Taylor testified that when he arrived earlier at the tail pulley area he saw no evidence of any abatement work taking place.

Inspector Christian and Inspector Taylor were recalled b me after they and Mr. Fergusen had testified. Mr. Christian confirmed that he discussed the abatement with Mr. Ayers and advised him that the use of rubber belting guarding materials were acceptable, as long as it was secure. He conceded that he "suggested" to Mr. Ayers that something more substantial should be used, and while he could not recall mentioning the use of chain-link fencing materials, he indicated that he would accept such fencing as an adequate guard so long as it was securely installed. Mr. Taylor stated that he and Mr. Christian had discussed the violation on the way to the mine the day after the citation was issued and that Mr. Christian advised him that while he told Mr. Ayers he could use rubber belting as guarding, he recommended to Mr. Ayers that metal materials be used.

When called in rebuttal by the petitioner, Inspector Christian admitted that there was disagreement among inspectors in his office as to what is acceptable guarding, and he admitted that in his district corrugated materials and well installed fencing materials are considered to be acceptable means of guarding belts. Inspector Taylor testified on rebuttal that he overheard his supervisor suggest to Mr. Fergusen that he submit drawings to MSHA so that a determination could be made as whether the materials used for guarding are adequate.

By letter and enclosures of May 21, 1984, in response to my request made during the hearing, petitioner's counsel submitted a copy of MSHA's policy directive covering the mechanical equipment guards required by section 75.1722. The policy directive cites "substantial chains, cables, or the equivalent" as examples of guards which are presumably acceptable to MSHA. Included as an attachment to this directive are two sketches labeled "standardized guard for belthead" and "standardized beltheads sections," with notations and examples as to what may be required. I note that nowhere is rubber belting material, fencing material, or metal material specifically mentioned.

Mr. Gillespie testified that after the citation was issued, Mr. Ayers instructed him to remove the belting material, but that he did not mention the type of material he was to use to abate the citation. Mr. Gillespie stated that he (Gillespie) suggested chain link fencing material, and after measuring and cutting it to size, he made arrangements to take it into the mine that same day. However, he claims that when he advised Mr. Christian that he intended to

install chain link fencing on some posts around the tail pulley, Mr. Christian informed him that this could not be done and that the fencing material should be bolted directly to the belt frame. Mr. Gillespie stated that he advised Mr. Christian that this was not feasible, and after further discussion, Mr. Christian rejected the use of rubber belting materials because he believed it would be hazardous. At that point in time, Mr. Gillespie discussed the use of corrugated or expandable metal materials, and after determining that it would have to be ordered, he decided to leave the belting material in place pending the arrival of the metal materials.

Mr. Gillespie testified that when Inspector Taylor confronted him the next day and asked for an explanation as to why the belt had not been guarded, he explained that the materials were on order and had not arrived. Mr. Taylor reacted by immediately ordering the shutting down of the belt. When mine foreman Ayers learned of this, he immediately ordered Mr. Gillespie to find "some scrap metal" material to fabricate a guard to suit the inspectors. Once this was done, it took Mr. Gillespie 45 to 50 minutes to install it with the assistance of Mr. Taylor.

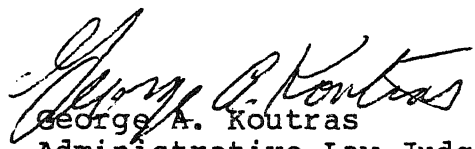
Having viewed Mr. Gillespie on the stand during his testimony, I find him to be a credible witness, and I believe his explanation of the events which transpired during the abatement period. Although the respondent did not produce any written invoices for the materials purportedly ordered, I have no basis for doubting that this was done. Petitioner suggests that the abatement was "forced" on the respondent only after the order was issued. While one may speculate as to why the "scrap material" was not used in the first place, Inspector Christian's somewhat equivocal testimony on direct, recall, and rebuttal as to what was acceptable to him to achieve abatement supports the respondent's suggestions that it did the best it could under the circumstances. Accordingly, I conclude and find that the petitioner has failed to establish that the respondent acted in bad faith, and its arguments in this regard are rejected.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty assessment in the amount of $400 is appropriate and reasonable for the section 104(d)(1) Citation No. 2124598, April 18, 1984.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $400 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this case is dismissed.



George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

LOCAL UNION 5817, DISTRICT 17, UNITED MINE WORKERS OF AMERICA (UMWA), Complainant	:	COMPENSATION PROCEEDING
	:	Docket No. WEVA 85-21-C
v.	:	No. 1 Surface Mine
MONUMENT MINING CORPORATION, AND ISLAND CREEK COAL COMPANY, Respondents	:	

SUMMARY DECISION

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint filed by the UMWA, Local 5817, District 17, against the respondents pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, seeking compensation for its member miners employed at the No. 1 Surface Mine who were idled by a section 104(d)(2) withdrawal order issued by MSHA Inspector Edward M. Toler at 5:15 p.m., on August 1, 1984. The order stated as follows:

> Protection of underground workers were not provided for the employees of the Brandy Mining Inc. No. 1 mine where blasting was performed at the Monument Mining No. 1 Surface mine exposing miners at the Brandy Mining Inc. No. 1 mine to falling rock and damage was done to mine property. 1 Drift canopy was destroyed and damage to the belt conveyor and miners were present outby of the underground area and one blast did occur.

The complaint asserts that as a direct result of the order, the miners scheduled to work from August 2 to August 3, 1984, were idled on certain work shifts scheduled for those days, and that they are entitled to compensation

at their regular rate of pay, plus interest at the rate of 20 percent per annum, and attorneys fees incurred in obtaining the claimed compensation.

The complaint was initially filed against the respondent Monument Mining Corporation. However, in view of Monument's failure to respond to several orders which I issued, and its failure to respond to the complainant's discovery requests, I issued a show-cause order directing the parties to show cause why Monument should not be held in default and a summary decision in favor of complainant should not be issued.

In response to my show-cause order, the complainant moved to amend its complaint to name Island Creek Coal Company as a respondent. Complainant asserted that at the time it filed its complaint against Monument, it had no knowledge that Island Creek was the owner of the No. 1 Mine. The motion was granted, and the matter was docketed for a hearing in Charleston, West Virginia. The hearing was subsequently cancelled after the parties advised me that a hearing was not necessary and that the matter would be submitted to me for decision by stipulations and supporting briefs.

Applicable Statutory Provision

> * * * If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. * * *

Stipulations

The joint stipulation of facts between the complainant and the respondent Island Creek Coal Company is as follows:

> 1. This proceeding is governed by the Federal Mine Safety and Health Act of 1977 (the Act) and the standards and regulations promulgated for the implementation thereof.
>
> 2. The Administrative Law Judge has

3. Island Creek Coal Company (Island Creek) is an operator within the meaning of section 3(d) of the Act.

4. The No. 1 Surface Mine, which is part of the Holden No. 29 Mine, is located in Holden, Logan County, West Virginia, and is owned by Island Creek.

5. At all times relevant to this proceeding, Monument Mining Corporation (Monument) was an independent contractor hired by Island Creek, and was an operator within the meaning of section 3(d) of the Act.

6. In accordance with the contract between Island Creek and Monument, Monument was responsible for mining an area of land known as the No. 1 Surface Mine. A copy of the contract is attached as Exhibit A.

7. At 5:15 p.m., on August 1, 1984, MSHA Inspector Edward M. Toler issued Withdrawal Order No. 2438645 pursuant to section 104(d)(2) of the Act to Monument, which related to the No. 1 Surface Mine. A copy of Order No. 2438645 is attached as Exhibit B.

8. Order No. 2438645 prohibited work from being performed in the entire pit area of the No. 1 Surface Mine.

9. The blasting which resulted in the issuance of Order No. 2438645 was performed and controlled by Monument. Island Creek exercised no control over the manner in which Monument conducted such blasting.

10. As a direct result of Order No. 2438645 the miners at the No. 1 Surface Mine were idled from 6:45 a.m., August 2, 1984 to 5:30 a.m., August 4, 1984.

11. A list of the names of the idled miners, their rates of pay and amount of wages lost as a result of the withdrawal order is attached as Exhibit C.

12. On or about October 15, 1984, Monument unilaterally ceased performance under the contract with Island Creek.

13. Upon information and belief, Monument is no longer in business.

14. The miners at the No. 1 Surface Mine were members of Local Union 5817, District 17 and are represented by the United Mine Workers of America.

15. Monument contested Order No. 2438645 pursuant to section 105(d) of the Act. The Notice of Contest was assigned Docket No. WEVA 84-374-R.

16. On February 13, 1985, the Notice of Contest docketed WEVA 84-374-R was dismissed. See Order Dismissing Proceeding attached as Exhibit D.

17. On March 21, 1985, Elm Coal Corporation began operating the No. 1 Surface Mine and continues to do so.

Issue

Is Island Creek liable in whole or in part for payment of compensation owed to employees of its independent contractor Monument Mining under section 111 of the Act as a result of the closure order issued to Monument Mining?

UMWA Arguments

Citing Bituminuous Coal Operators Ass'n v. Secretary of the Interior, 547 F.2d 240, (4th Cir. 1977); Republic Steel v. Interior Board of Mine Operations Appeals, 581 F.2d 868 (D.C. Cir. 1978); Secretary of Labor v. Old Ben Coal Co., 1 FMSHRC 1480, aff'd, D.C. Cir. No. 79-2367 (Dec. 9, 1980), (unpublished); Harman Mining Corp. v. FMSHRC & Secretary of Labor, 2 MSHC 1551 (4th Cir. 1981); and Cyprus Industrial Minerals Co. v. FMSHRC & Donovan, 2 MSHC 1554 (9th Cir. 1981), the UMWA asserts that it is well established that an owner-operator of a mine can be held responsible, without fault, for a violation of the Act committed by an independent contractor.

Recognizing the fact that the cited cases arose in the context of section 104 or 110 enforcement proceedings, the UMWA asserts that the statutory language which allowed imposition of liability on the owners in those cases, applies equally to cases brought under section 111. Since section 111, like sections 104 and 110, speaks in terms of the operator's liability to compensate idled miners, and since Island Creek is the mine owner, the UMWA concludes that it can be held liable for the compensation under section 111, regardless of the fact that it did not create the danger requiring the withdrawal of miners.

In its supporting brief, the UMWA asserts that the rationale of the Commission in Secretary of Labor v. Phillips Uranium Corporation, 4 FMSHRC 549 (1982), and Secretary of Labor v. Cathedral Bluffs Shale Oil Company, 6 FMSHRC 1871 (1984), in obsolving the mine owner from liability for the violations of its independent contractor is inapplicable in the instant case.

Counsel argues that in the Phillips case, the Commission felt that the Secretary's "owner's only" enforcement policy undermined the Act in that it allowed large skilled contractors who violated the Act to "proceed to the next jobsite with a clean slate, resulting in a complete short-circuiting of the Act's provisions for cumulative sanctions, should the contractors again proceed to engage in unsafe practices." 4 FMSHRC at 553. In contrast, the owner would have the violation entered into its history, resulting in future large penalties. As a result of the violations, the owner could also be subjected later to the stringent section 104(d) and 104(a) sequence of violation provisions.

The UMWA points out that while the Commission never retreated from its holding of owner liablity, it vacated the citations and orders issued in the Phillips case because they stemmed from a litigation decision resting solely on considerations of the Secretary's administrative convenience, rather than on a concern for the health and safety of miners.

In the Cathedral Bluffs case, the UMWA points out that the violation occurred subsequent to the Secretary's adoption of independent contractor regulations, and that based on those regulations, the Secretary cited both the mine owner and the contractor. The Commission's vacation of the citation issued to the mine owner was based on its finding that the record did not support the Secretary's contention that the mine owner had control over the cited condition or that the owner's miners were exposed to the hazard.

The UMWA concludes that it is clear under the Old Ben, Phillips, and Cathedral Bluffs decisions, the Commission's review of the Secretary's decision to prosecute a mine owner for a contractor's violation will be made on the basis of whether or not the Secretary's choice was made for reasons consistent with the purposes and policies of the Act. The reasonableness of the Secretary's action will depend on the degree of control retained by the operator and whether the owner's miners are exposed to the hazard.

The UMWA points out that the instant case raises the issue of whether miners idled by a withdrawal order issued to an independent contractor should be required to demonstrate the owner's control of the contractor or exposure to the hazard by the owner's employees, before they can prevail in a section 111 proceeding against the mine owner. The UMWA concludes that they should not.

In support of its argument, the UMWA argues that unlike the situations in Old Ben, Phillips, and Cathedral Bluffs, compensation cases arising under section 111 of the Act do not involve review of the Secretary's enforcement policy. For that reason, the UMWA concludes, the policy issues that concerned the Commission in those cases are simply not present in cases like the instant one. The UMWA asserts that unlike the situations in those cases, it did not proceed against Island Creek under an owners-only policy. It points out that it first attempted to proceed against the contractor (Monument Mining) who created the condition requiring withdrawal, and that only after learning that Monument had gone out of business and that the idled miners would have no other way to enforce their statutory rights under section 111 did it seek to make Island Creek a respondent.

The UMWA asserts that imposing liability of Island Creek in this case will not increase Island Creek's history of violations, thereby leading to increased future penalties. Nor will it increase Island Creek's potential for liability under sections 104(d) or 104(e). Imposing liability on the owner in this case does not mean the contractor will move onto the next job with a "clean slate," since the violations have become part of Monument's history of violations, and Monument will not be going onto any other job since it has gone out of business. Further, the UMWA asserts that the imposition of section 111 liability on the owner does not mean Island Creek wil be unfairly penalized for a violation over which it had no control. It may, however, motivate

Island Creek to refrain from hiring "fly by night" contractors who have little incentive to comply with mandatory standards.

The UMWA argues that contrary to the situation in Old Ben, Phillips, and Cathedral Bluffs, imposing liability on Island Creek in this case would further the underlying purposes and policies of the Act. In support of this conclusion, the UMWA asserts that section 111 was not intended as a punitive measure but was considered a way to equalize some of the financial hardships that occurred when mines were idled by withdrawal orders. "It does not insulate the miners from loss due to withdrawal orders . . . [r]ather it distributes the loss between miner and operator in the manner Congress apparently decided was the most equitable means of achieving mine safety." Rushton Mining Co. v. Morton, 520 F.2d 716, 721-22 (3d Cir. 1975); Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess., at 634-35 (Comm. Print 1978).

The UMWA argues further that section 111 compensation is seen as a way of lessening possible inhibitions miners might have in reporting unsafe conditions, or that MSHA inspectors might have in issuing withdrawal orders. A miner who felt his safety complaint might lead to the loss of several days pay for himself and his fellow workers might hesitate before bringing the problem to the attention of the federal inspectors. Likewise those inspectors might be reluctant to issue a withdrawal order if they felt it would result in severe economic distress to the miners.

The UMWA maintains that since section 111 compensation furthers important purposes of the Act, denying miners the opportunity to collect such compensation frustrates those purposes. The UMWA asserts that refusing to impose liability on the mine owner in this proceeding forecloses the possiblity of the miners establishing a viable claim under section 111, and that such a ruling would encourage mine owners to shield themselves from liability by hiring independent contractors. There would be no incentive to hire large stable contractors who will be around for a long time, because the mine owner could escape liablity even if the contractor goes out of business. The possibility of no compensation will seriously deter the employees of those contractors who might otherwise be inclined to report unsafe conditions. The MSHA inspectors may find themselves reluctant to issue a withdrawal order to a small, or newly-formed company performing work as an independent contractor. These same MSHA inspectors would also feel proscribed, under

Commission decisions, from issuing the order to the mine owner, unless there was evidence of owner control.

The UMWA asserts that imposing section 111 liablity on the mine owner for the contractor's violations is no more unfair or inconsistent with the Act than the imposition of liability against an operator under section 111 even though the withdrawal order was later vacated as having been "issued in error." Rushton, supra, 520 F.2d at 718. In Rushton, the operator argued that such imposition of liability had "the effect of holding Rushton liable without fault for the acts of the Government's agent . . . ." The Court was unpersuaded by Rushton's argument, however, and required compensation to be paid to the idled miners. The UMWA observes that if an erroneously issued withdrawal order can trigger an operator's liability under section 111, then an order issued to the contractor should be able to trigger liability on the part of the mine owner.

The UMWA concludes that the Commission and the courts have emphatically held that, as a matter of law, mine owners are liable without fault for the violations that occur in their mines. It further concludes that only where the decision to impose liability on the owner would conflict with the underlying policies and purposes of the Act, has the Commission refused to apply this principle. Since Island Creek can show no such conflict in this case, the UMWA believes that it is entitled to a summary decision in its favor. In support of its argument, the UMWA cites the case of Local Union 8454, UMWA v. Pine Tree Coal Company and Buffalo Mining Company, 7 FMSHRC 236, 240, February 15, 1985, 3 MSHC 1747 (1985), Commission review denied on March 27, 1985. In that case Judge Broderick held the mine owner and its independent contractor jointly and severally liable under section 111 to pay compensation to the miners idled as a result of an order of withdrawal. The UMWA states that because the conditions giving rise to the withdrawal order were the responsibility of the owner, Judge Broderick had no need to analyze the issue of owner liability under section 111 when there is no evidence of supervision or control by the owner.

Island Creek Arguments

Island Creek states that under Article 7 of the mining contract, Monument had full and complete control of the work to be performed at the No. 1 Surface Mine and, except as was necessary to protect Island Creek's property, or to insure conformity to its mining plans and projections, Island Creek

had no control over Monument's employees or mining operations. Under Article 8 of the mining contract, Monument was clearly an independent contractor and title to coal mined by Monument remained with Island Creek. Monument was responsible under Article 11 for compliance with all of the laws applicable to its operations. Pursuant to Article 13, Monument was solely and exclusively responsible for its employees in performance of the mining contract. Compliance with the standards and regulations issued by the Mine Safety and Health Administration was also the responsibility of Monument under Article 13 of the mining contract.

Conceding that it had certain rights to monitor the work of Monument under the contract, Island Creek points out that the blasting activity on August 1, 1984, which gave rise to the issuance of the Order of Withdrawal was performed and controlled by Monument, and Island Creek exercised no control over the manner in which the blasting was conducted.

With regard to the UMWA's reliance on the Pine Tree decision, Island Creek states that the imminent danger order which triggered the claim for section 111 compensation was issued when an active gas well was mined into by Pine Tree. Buffalo Mining Company was brought into the compensation proceeding by both Pine Tree and the UMWA, and the issue presented was whether Pine Tree or Buffalo or both were liable under the facts presented to pay compensation to the miners idled by the order.

Island Creek points out that in the Pine Tree case, Pine Tree was held liable since it operated the mine, employed and paid wages to the miners, and was served with the withdrawal order. The condition giving rise to the withdrawal order was found to be the responsibility of Buffalo. Further, Island Creek points out that in relying on several cases which addressed the liability of owners for safety violations of their contractors, Judge Broderick found by analogy that Buffalo was jointly and severally liable. The test applied was, ". . . the decision to proceed in a compensation matter against an owner may be upheld if, as is the case here, the conditions giving rise to the withdrawal were the responsibility of the owner."

Island Creek maintains that while the overall contractual relationship between Pine Tree and Buffalo may be similar to that of Monument and Island Creek, the operative facts in this proceeding are significantly different from those in Pine Tree. By contract right and in practice,

Buffalo undertook, for a charge paid by Pine Tree, to furnish written plans and projections to be followed by Pine Tree. Pine Tree was operating with mine maps so furnished by Buffalo when the gas well, not identified on such maps was struck. Having undertaken preparation of mine maps, the conditions (inaccurate maps) which gave rise to the withdrawal order were clearly the responsibility of Buffalo. As further evidence of this responsibility, Buffalo actively assisted in the work of abating the withdrawal order.

Island Creek argues that in the present proceeding, the conditions (blasting) which gave rise to the withdrawal order were clearly performed by and within the sole control of Monument. Island Creek had not undertaken responsibility for Monument's operations nor did it exercise any control over the manner in which Monument conducted the blasting at those operations. These conditions were, by contract and in practice, the responsibility of Monument. Island Creek concludes that the facts in the instant proceeding do not support, under the test enunciated in Pine Tree, a finding that Island Creek is liable for compensation in whole or in part for payment of compensation to employees of Monument under section 111 as a result of the closure order issued to Monument.

Findings and Conclusions

In the Pine Tree case, Judge Broderick held Buffalo liable jointly and severally with its independent contractor Pine Tree because Buffalo supplied the contractor with certain mine maps which did not identify the location of the gas well which was struck. When the contractor mined into the well, it contacted Buffalo's engineering department who assured the contractor that no such well existed. When it was discovered that a well was in fact mined into, an imminent danger withdrawal order was issued, and it was the basis for the claimed compensation. Since Buffalo had failed to note the existence of the gas well which it furnished its contractor, and since it gave further inaccurate advice to the contractor concerning the existence of the well, Judge Broderick found that Buffalo was culpable, that it assisted in the abatement, and that the violation was its responsibility. In essence, Judge Broderick found a nexus between Buffalo's conduct and the issuance of the order which idled the miners, and one may conclude that he found the proximate cause of the withdrawal order was Buffalo's failure to advise its contractor of the existence of the gas well, and the mis-information or advice it gave to Pine Tree after the matter was called to its attention.

In the Pine Tree case, Judge Broderick found that Buffalo supervised the contractor's mining and mapping projections, and supervised its activities in this regard. These facts are not present in the instant case. In this case, there is nothing to suggest that Island Creek's conduct in any way impacted on the issuance of the withdrawal order. The blasting operation which prompted the issuance of the withdrwal order was performed and controlled by Monument, and Island Creek played no role in that incident, nor did it in any way assist in the abatement. In short, I find no connection whatsoever between Island Creek and the violative conditions which prompted the withdrawal order giving rise to the compensation claims.

The UMWA's argument that refusing to impose liability on Island Creek in this case would permit it to shield itself from future liability for contractor violations because there would be no incentive for it to hire responsible contractors who have little incentive to comply with mandatory standards are not well taken. In the first place, there is no evidence to support the UMWA's assertion that Monument Mining was a "fly by night" contractor. Further, I find it highly unlikely that Island Creek would knowingly retain such a contractor and subject itself to liability for civil penalty assessments and closure orders for violations of the Act's mandatory safety or health standards. On the facts of this case, it seems obvious to me that the UMWA is looking to Island Creek for payment of the claimed compensation because it has no other recourse, and has no one else to look to. Rather than filing a responsive answer to my Show Cause Order as to why Monument should not be held in default and liable for payment of the claimed compensation because of its failure to file responses to my pretrial orders, the UMWA joined Island Creek as a convenient party-respondent simply because it is the owner of the coal lease and has reachable financial resources for payment of the compensation. I believe that something more must be established.

With regard to the UMWA's arguments that a failure to hold the mine owner liable for compensation on the facts of this case will inhibit MSHA inspectors from issuing withdrawal orders, and will inhibit miners from filing complaints because of the economic consequences, I can only observe that an inspector's first consideration should be the safety of the miners. He has a duty to act regardless of any economic considerations. This applies equally to miners. Their first consideration should be their safety,

not the fact that they might not be compensated for time lost because of a closure order.

Judge Broderick's decision to hold Buffalo liable for the acts of its contractor Pine Tree was based on his conclusion that the conditions giving rise to the withdrawal of miners was the responsibility of Buffalo, Secretary v. Phillips Uranium Corporation, 4 FMSHRC 549 (1982). He also cited Bituminous Coal Operators Association v. Secretary, 547 F.2d 240 (4th Cir. 1977), and Secretary v. Republic Steel Corporation, 1 FMSHRC 5 (1979), 1969 Coal Act cases which held that mine owners may be held liable for safety violations committed by independent contractors.

In the Philips case, a case arising under the 1977 Mine Act, the Commission ordered the dismissal of Phillips as the responsibility party for the violations which gave rise to the civil penalty assessments, and it did so on the basis of its conclusion that the Secretary had reason to know that the contractor created the violative conditions which gave rise to the citations and orders, and was in the best position to eliminate the hazards and prevent them from recurring. The Commission applied this same test in a recent case decided on August 20, 1985, Secretary v. Calvin Black Enterprises, Docket Nos. WEST 80-6-M, 80-21-M, and 80-82-M, where it affirmed a judge's conclusion that Calvin Black Enterprises, as the mine owner-operator, contributed to the violation and was in the best position to eliminate the hazard and prevent it from recurring.

With regard to the Rushton case cited by the UMWA to support its "no fault" theory of liability for compensation claims, I note that the case was decided under the 1969 Coal Act before the Commission's decisions interpreting independent contractor liability under the 1977 Mine Act and the Secretary's independent contractor regulations. I also note that the Court in Rushton relied on the statutory distinctions concerning the issuance and "finality" of the orders in question, particularly with respect to the Congressional understanding as to the differences between an order which is ultimately upheld and one which is ultimately vacated, and the compensation which should be paid by the mine operator as a result of such orders. That case did not involve an independent contractor. It turned on the liability of an operator for orders subsequently found to have been issued in error by MSHA. I reject the UMWA's suggestion that this "no fault" theory should be applied across-the board in compensation cases adjudicated subsequent to the 1977 Mine Act.

applied in the Phillips and Calvin Black Enterprises cases.

In view of the foregoing findings and conclusions, particularly my findings that Island Creek was in no way responsible for the violative conditions which gave rise to the withdrawal order idling the miners, I reject the UMWA's assertion that as the mine owner, Island Creek should be held liable to pay the compensation in question. To the contrary, I conclude and find that the responsibility for paying the compensation lies with Monument Mining Company, the responsible mine operator. While it is unfortunate that Monument is no longer in business, I find no basis for the UMWA's attempts to hold Island Creek liable for the payment of these claims.

I further find and conclude that in view of Monument Coal's failure to respond to my pretrial orders, to the complainant's discovery requests, or to otherwise defend this case, it is in default, and IT IS ORDERED to pay the compensation claims filed against it by the UMWA.

Insofar as the UMWA's complaint against Island Creek Coal Company is concerned, IT IS DISMISSED.

George A. Koutras
Administrative Law Judge

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